

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-5003

United States Court of Appeals

FOR THE SECOND CIRCUIT

In re

THE FABRIC TREE, INC.,

Debtor-Appellee.

MANGEL STORES CORPORATION,

Appellant.

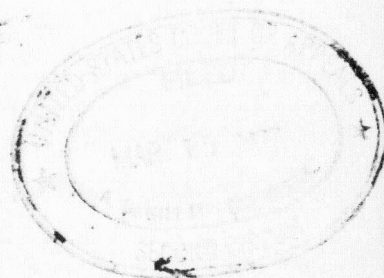
On Appeal from the United States District Court for the
Southern District of New York

JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

JOINT APPENDIX

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DOCKET ENTRIES

13-2534577		Form Middle		209		75-3-1333	
THE VALRIC TREE INC. 2/7				CHAPTER OR SECTION		CHECK IF	
				Chap XI-322		☒ Voluntary	
				DATE PETITION FILED		☐ Inventory	
				8/6/73		☐ Fee paid in full	
ADDRESS OF BANKRUPT/DEBTOR (Number and Street)				DATE CLOSED		OCCUPATION	
10 East 61st Street						☒ Corporation	
CITY				DISCHARGE		(Check one)	
New York				☐ Granted		☐ Prisoner	
COUNTY				☐ Denied		☐ Employee	
STATE				☐ Waived		☐ Professional	
N.Y.				DATE DISCHARGED		☒ Other (from business)	
						☒ Merchant	
				PETITION DISMISSED?		CHAPTER UNDER WHICH CASE WAS PENDING WHEN DISMISSED	
				☐ YES			
				NAME OF DISTRICT JUDGE			
				NAME OF BANKRUPTCY JUDGE			
				Ann S. Eisman			

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RECEIVER	
ATTORNEY FOR RECEIVER	
TRUSTEE	
ATTORNEY FOR TRUSTEE	

CHANGES OF PRINCIPALS	
-----------------------	--

DATE	PROCEEDINGS
8/6/75	Filed Petition under Chap. XI-322, Statement of Assets and Liabilities, Exemptions, Affidavit Under Rule XI-2. Referred to Bankruptcy Judge Herzog.
8/3/76	Filed True Copy of the ORDER CONFIRMING PLAN. So ordered Babitt, J. dated 8/2/76.
8/18/76	Filed ORDER directing clerk to calendar appeal on August 31, 1976. So ordered Babitt, J. dated 8/16/76. f.
8/18/76	Filed NOTICE OF APPEAL to the USDC by Mangel Stores Corp., from the order of Judge Babitt dated 8/2/76. RET: 8/31/76. at 10:30 AM in room 506. f.
8/18/76	Filed DESIGNATION OF CONTENTS of Record on appeal: and statement of Issues on appeal. f.

FORM BK 74-D
AUG. 1974

UNITED STATES DISTRICT COURTS
BANKRUPTCY DOCKET—COPY

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PAGE 3

THE FABRIC TREE, INC.

75 B 1383

- 8/23/76 Filed Objections to the designations of contents of record on appeal files by the appellant and by appellee-debtor. f.
- 8/24/76 Filed MEMORANDUM OF APPELLANT, Mangel Stores Corp. Sub By: Cole & Deitz. f.
- 8/26/76 Filed DEBTOR-APPELLEE'S Memorandum of Law. Sub By: Levin & Weintraub
- 9/2/76 Filed MEMORANDUM of Appellant Mangel Stores Corp., Sub By: Cole & Deitz. f.
- 1/14/77 Filed OPINION & ORDER, #45524 this appeal from an order entered 8/2/76, accordingly, the decision of the Bkcy. court to approve the arrangement petition is affirmed. So ordered Werker, J. dated 1/11/77. m/n f.
- 2/7/77 Filed NOTICE OF APPEAL, to USCA by Mangel Stores Corp. from order of District Judge Werker, J. dated 1/11/77. f. m/n

Transcript of proceeding held before
Bankruptcy Judge Stanley T. Lesser on
July 27, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter

of

THE FABRIC TREE,

Debtor.

No. 75 B 1383

U. S. Courthouse
Foley Square
New York, N. Y.

July 27, 1976

Adj. Rule XI-4 - Adj. Conf.
Adj obj to claims

Adj restored OSC v. Beaver Valley Mall
(Adjourned to July 30th - 10 A.M.)

B E F O R E:

HON. STANLEY T. LESSER,

Bankruptcy Judge

RAYVID REPORTING SERVICE

CERTIFIED STENOGRAPHIC REPORTERS

150 NASSAU STREET

NEW YORK, N. Y. 10038

CORLAND 7-3877
3878

Fabric Tree

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BY:

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-and-

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BY:

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New York, N. Y.

BY:

FRED SCHROEDER, ESQ.

-and-

ROBERT ROSENBERG, ESQ., of Counsel

W. BERNARD RICHLAND, ESQ.

Attorney for The City of New York

Municipal Building

New York, N. Y.

BY:

ROBERT KRAUT, ESQ., of Counsel

- - -

MR. CRAMES: Your Honor, perhaps
first I should bring you up to date since
we were last here.

As you recall, we were before you
on July 15th and we had a rather long off-

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the-record session trying to work out some stipulation whereby the operation of the business could continue while the dust settled, as it were, on what obligation, if any, Mangel's had to go forward and what position, if any, the Creditors Committee would take with respect to the Mangel's commitment and with respect to the future operation of the business.

Since then, there has been incessant activity in all departments.

I want to report to you on what has happened and what we will request you to do this morning.

First and foremost, there has been a stipulation drafted and redrafted at least twice. In its present form, it is not one which meets with the approval with all of the parties.

There are a couple of problems with it. Suffice it to say, that the parties have been acting as though the stipulation had been signed and as though

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3 it controls, which Mangel's had requested
4 were in effect; namely, operating expenses
5 are being paid. There are more than suf-
6 ficient funds in the bank account to cover
7 all other current obligations, rent,
8 utilities, and the like.

9 There has been no prejudice or
10 problem in that regard.

11 THE JUDGE: No additional funds
12 have been required?

13 MR. CRAMES: No, your Honor, the
14 moneys which have been realized from the
15 sale of merchandise in the regular course
16 of merchandise have proven and are
17 adequate to cover all of these expenses
18 as they mature.

19 We had a meeting with the Creditors
20 Committee yesterday. It was an all-afternoon
21 meeting and we discussed with the Committee
22 fully the events leading up to July 15th
23 and Mangel's determination not to proceed.

24 We went over the figures with the
25 Committee as to the claims filed, as to

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the administration expenses and priorities and other items which entered into the determination of the amount required to confirm the plan.

We went over with them where we thought this company could go in the event that Mangel's determined to have in further involvement or participation.

The Committee made several determinations yesterday and Mr. Fabrizio is here to correct me if I go astray or to add whatever he wants to do.

Basically, the Committee felt and expressed its conclusion that Mangel's was, indeed, committed and that they would cause to be done whatever had to be done to bring the amount required to confirm this plan within the limits prescribed in the Mangel's commitment which I will explain.

The Committee is comprised of ten members which, among them, represent approximately \$2,000,000 of the \$3,000,000 in unsecured debt.

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The bulk of that \$2,000,000 is represented by Bankers Trust Company by dint of its own claim directly and claims which are subordinated in its favor and which has filed as subro-agreement, the Committee determined that it would, as individual creditors, reduce their claims by whatever amount was necessary to bring the aggregate of the claims within the \$3,000,000 so that \$450,000 would be all that was required to pay fifteen per cent.

Any such overage would be borne two-thirds to Bankers Trust and one-third to be divided equally among the rest of the members of the Committee.

MR. FABRIZIO: That is, basically, the Committee's agreement.

MR. CRAMES: As we had told you on the 15th by reason of the priority claims, particularly pre-Chapter XI taxes, exceeding the amount that had been projected and by reason of other administration claims arising which would have to be considered as part and

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parcel of "unpaid administration expenses,"
the \$150,000 figure in the Mangel's commitment proved to be inadequate.

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The Committee further determined, and the professionals affected consented, to waive so much of the fees allowed by your Honor as would be required to reduce the total for priorities and administration claims to 150, so that the aggregate amount needed to confirm this plan would not exceed 650.

The parties affected are Levin & Weintraub; Clarence Rainess; New York Creditmen's Adjustment Bureau; Hahn, Hessn, Margolis & Ryan; Mangel Stores, Inc., who will pay their proportionate share of any excess over and above \$150,000 so as to bring that figure into line.

By anybody's count, and we are prepared today to indicate to you what the administration expenses and priorities are as they stand, by anybody's count, a proportionate waiver of these fees would bring

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3 down well in the \$150,000; the actual
4 amount required, with the result that the
5 Committee has determined that it desires
6 that Mangel's be held to its bargain and
7 that the plan be confirmed on that basis.

8 A word with respect to the July
9 15, 1976 deadline, your Honor.

10 I don't think it can be said, your
11 Honor, that this ever was contemplated to
12 be or was on July 15th or is today a time
13 of the contract.

14 The July 15th date bears no rela-
15 tion, so far as I know, to what the parties
16 intended or what was bargained for when
17 this commitment letter was structured.

18 I think that it can be established
19 to the satisfaction of the Court that the
20 benefit of the Mangel's bargain is as valid
21 today as it was on July 15th. They can
22 still obtain what they had sought and there
23 has been no change, let alone a material
24 and adverse change, in the intervening
25 twelve days.

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The Committee that has made it clear that they don't intend to relinquish the time certificate of deposit of \$650,000 which is held by the chairman of the Creditors Committee; that they feel that Mangel is bound to proceed.

On the basis of what I have indicated by virtue of the reduction that the Committee members have agreed to do, which was unanimously agreed upon by the Committee, and the professionals are prepared to consent that the figure can be brought down to the 650 figure. The operations of the business have been made as status quo; checks have been drawn and are being drawn in payment of the obligations as they mature and fall due.

Insofar as the inventories and the leases, Mr. Felner and Mr. Echikson, who are the principals of Fabric Tree, are here and are prepared to testify, if your Honor feels that it is necessary to testify that those assets are what they were on July

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15th and immediately prior thereto, and what Mangel's had contracted for can be given to them.

THE JUDGE: What was the resolution about this disagreement about this \$70,000, I believe that is the number, of expenses that Mangel claimed was administration which had been paid during the period of the Chapter or which were pre-filing expenses that had been paid?

MR. CRAMES: This \$70,000 figure, your Honor, was, basically, comprised of two pieces. One piece represented expenses of administration which, indeed, arose during the D.I.P. period and which were paid.

Mangel's took the position that these items were paid with the proceeds of its collateral and this should not have been done, and the other side of that argument is that they were a bona fide expense of administration as the officers of the debtor are prepared to testify, and that

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3 payment of them was proper and they were
4 obligated to make these payments.

5 The second piece of the \$70,000
6 represents certain administration expenses
7 that accrued but have not been paid, such
8 as there are some rents, D.I.P. rents
9 owed to landlords and there are some taxes
10 reflected in a couple of administration
11 claims filed by taxing authorities and
12 these items, I think, under the terms of
13 the Mangel's commitment must, indeed, be provide
14 for and are part of the \$150,000 and, to the
15 extent that any of the allowances must be
16 proportionately reduced, they will have to
17 be proportionately reduced to reflect and
18 take care of items such as those.

19 MR. FABRIZIO: Your Honor, as far
20 as that \$70,000, I think we could make it
21 clear that even if the entire \$70,000 is
22 included there still is enough to come
23 within the terms of the agreements by nature
24 of the waiver of fees.

25 If at some time it is determined

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that not all of the \$70,000 belongs in that category, there may be some money available for fees.

In any event, with the total waiver of fees, we can come within that commitment.

THE JUDGE: Has there been any replenishing of inventory during this sale period?

MR. CRAMES: You mean in the past two weeks or thereabouts your Honor?

THE JUDGE: Yes.

MR. CRAMES: I don't know.

MR. ECHIKSON: There has been some flow of merchandise that has been in transit coming into the stores. I cannot tell you the exact figure at this time.

THE JUDGE: I think that we ought to hear from the Mangel's people here who have some comment on counsel's remarks.

MR. ROSENBERG: We certainly do, your Honor. We heard Mr. Crames and could not disagree more strongly.

We have no intention of waiving

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what we see as a firm condition of that contract, namely, that confirmation take place by July 15th.

If there is litigation subsequently in the return of the certificate of deposit, so be it.

It will be determined at that time whether Mangel is correct or Mr. Crammes is correct as to the importance of that date.

We agreed at the last hearing that we would continue to finance Fabric Tree for thirty days and take a good look to see if there are any circumstances under which Mangel's would be willing to go forward. However, it is our position that there is no legal commitment to do so and, despite Mr. Crammes' remarks, the legal commitment came and went on July 15th.

MR. FABRIZIO: If I may set the record straight, they continually tell the Court to take a good faith look. They told the Committee yesterday that they were not willing to go forward with this arrange-

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ment under no circumstances.

There has been no change in the position of any of the parties since July 15th.

If the Court feels that the testimony is necessary, it should take the testimony and, based upon that testimony, enter an order of confirmation subject to the submission of a final order of confirmation.

THE JUDGE: Other than my entering an order of confirmation, which would only be in accordance with the rules of the Court here upon the proper submission of papers, et cetera. What is our jurisdiction beyond that to decide this controversy between the debtor and Mangel's?

MR. ROSENBERG: There is none, your Honor. The res in question is a deposit made by Mangel's with a third party, the chairman of the Creditors Committee.

If there is a confirmation here that money would pass from the Creditors Committee to the Court-appointed depository. There is no interest in the debtor whatsoever

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3 under any circumstances to these moneys and
4 I submit to the Court that for that reason
5 there are several cases which are quite on
6 point MidJersey National Bank, a Third
7 Circuit case which I will hand up to you.

8 In re Bayview Estates. The facts
9 were where a situation was that the debtor
10 deposited a supersiduous bond with the
11 Court of Appeals for appeal, and the Court
12 held that the deposit, the bond, was in
13 custodia legis, the res of a trust not
14 for the benefit of the debtor and not
15 within the jurisdiction of the Chapter XI
16 Court.

17 THE JUDGE: Are you saying that if I
18 were to enter a confirmation order and the
19 chairman of the Committee were to turn over
20 that money to the disbursing agent to fund
21 the confirmation that you would have a personal
22 dispute with that individual, based upon his
23 alleged violation of the terms of the receipt
24 of the money and that is a dispute that would
25 have to be litigated elsewhere?

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MR. ROSENBERG: That's correct.
Your Honor, under Section 362, I believe
it is, of the Act, I am speaking off the
top of my head, a prerequisite to an order
of confirmation is a finding by the Court
that the deposit has been made.

Under the terms of the escrow ar-
rangement, no deposit can be made unless
Mangel's authorized the escrow agent to
release the funds, obviously, under the
circumstances, Mangel's will not do so;
thus, I believe that a pre-condition to an
order of confirmation will not exist.

If you take the next step --

THE JUDGE: Excuse me. "The
debtor had made this deposit required
under the arrangement," and I gather what
you have just stated that the debtor need
not make one.

MR. ROSENBERG: He has to make one.

THE JUDGE: Under this arrangement
it is zero. It is the deposit of the
Bankers Trust.

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MR. ROSENBERG: He cannot put that deposit in the Court because Mangel's will not authorize him to do so.

MR. FABRIZIO: It is being held by the chairman of the official Creditors Committee appointed by the Court and is within the custodia legis of this Court and, if Mangel's wants to get it back --

THE JUDGE: I will not decide that now.

MR. FABRIZIO: All of the agreements under which this deposit had been made and the agreements giving Mangel's the security agreement were given to the Court for approval --

MR. ROSENBERG: That is not true.

MR. FABRIZIO: An order as authorized with respect to the agreements.

THE JUDGE: I think the only agreement which the Court never saw was the agreement by which Mangel's advanced money to the debtor and got a security interest.

MR. TREPPER: That's correct.

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MR. ROSENBERG: The escrow agreement was not submitted to the Court. They are not party to the agreement.

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THE JUDGE: Then why were they involved in this agreement that set the 15th for confirmation?

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MR. ROSENBERG: I would submit to the Court that you don't have jurisdiction over that agreement. That is my point.

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THE JUDGE: If we are not involved in that agreement, and I am thinking out

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MR. ROSENBERG: Yes, but you are making several assumptions which I cannot

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3 believe can take place and that goes that
4 with the advice of counsel that the escrow
5 agent will release the funds.

6 If, indeed, that he does and the
7 scenario happens, then it would be Mangel's
8 problems to sue in another court.

9 I am assuming that will not happen.

10 THE JUDGE: What is your answer,
11 by the way, in getting back to the basic
12 question, to the fact that you prevented the
13 debtor from confirmation on the 15th by in
14 advance of that date on a precipitatory basis
15 that the debtor could not satisfy the con-
16 ditions, et cetera?

17 MR. ROSENBERG: We did say that
18 there were other reasons why confirma-
19 tion could take place. That \$670,000 figure
20 could have been met on the 15th.

21 There are sixty or seventy
22 thousand dollars in tax claims greater
23 than anticipated. That, alone, prevented
24 the confirmation on the 15th.

25 Had that not been the case and

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3 Mr. Crames attempted to confirm on the 15th,
4 I suppose that your Honor would have had
5 before you the question of the additional dis-
6 putes.

7 That was not the case, even without
8 the disputes, confirmation could not and
9 would not take place on the 15th.

10 MR. FABRIZIO: It could have gone
11 forward on the 15th as it could go forward
12 today. The figures were available to
13 Mangel's. They led the debtor to believe
14 that there was no problem and they --

15 MR. ROSENBERG: That is not true.
16 Mr. Fabrizio was not present, but Mr.
17 Crames and Mr. Trepper were told that if
18 they were one penny over \$600,000, Mangel's
19 will not go forward. That is not true.
20 I was present on June 29th where the presi-
21 dent of Mangel's stated to Mr. Crames and Mr.
22 Trepper, "One cent above and we will not
23 go forward on the 15th."

24 MR. CRAMES: Perhaps we can lay to
25 rest a question which is a bogus question,

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3 the escrow of the \$600,000 credited is a
4 very simple escrow. The condition is that
5 being the certificate of deposit, in the
6 second full paragraph on the second page:
7 "It is a condition to our commitment here-
8 under that the certificate of deposit de-
9 livered to you hereunder shall be employed
10 for the purposes of making the deposit
11 necessary for confirmation of the arrangement
12 proceedings," and the rest of the sentence
13 talks about Mangel's being entitled to any
14 interest on it.

15 Mangel's put up \$600,000 with the
16 Committee to be used for confirmation.
17 Obviously, when a case is ready to be con-
18 firmed and advice to that effect are given
19 to the escrowee, the Act requires that the
20 res be turned over to the Court-appointed
21 disbursing agent so that one of the condi-
22 tions of the Act can be satisfied; that
23 the \$600,000 is in and the escrowee is
24 prepared and was prepared to turn that
25 over for the purposes of making the

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requisite deposit to the Court-appointed disbursing agent is true now as it was then.

THE JUDGE: In looking at this letter, gentlemen, how could we have confirmed on the 15th of July when the funds for the confirmation don't become free until September 2nd?

MR. CRAMES: That is a time certificate of deposit. The certificate itself could have been deposited with the disbursing agent as had been done previously. We confirmed deposit to sales before Judge Ryon on Friday of last week for \$2,000,000-plus.

That was a certificate issued by a Boston bank in the name of a third party which had turned the certificate over to the disbursing agent together with an appropriate assignment thereof.

THE JUDGE: Does this mean that could not have been a distribution until the 2nd of September ?

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THE JUDGE: Is it your position in computing the \$600,000, Mr. Crames, as of what date do you compute them?

MR. CRAMES: Your Honor, the figures that I have before me happen to be as at July 15th with such revisions as have been made to reflect changes in claims filed and reductions effected by Court orders since then; the impact of which, your Honor, doesn't in any way diminish the ability to have brought this below \$600,000 as at July 15th.

THE JUDGE: What is your position with respect to any administration expense incurred since July 15th?

MR. CRAMES: Insofar as any administration expenses incurred in the interim, and I guess you are talking about continual accruing rents, payroll and utilities and the like, all of which are being paid in the regular course, and I understand that there is something like \$120,000 sitting in the bank account

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Fabric Tree

with thirty for the tax and trust account, leaving \$90,000 for other operating expenses, which sum is more than adequate to cover whatever may have been run up.

These are expenses that are being paid in the regular course.

I want to comment with respect to the question that you asked of counsel as to what significance, if any, the July 15, 1976 date ever had or now has.

Perhaps the man to respond to that is my partner, Mr. Trepper, who was privy to these negotiations to a greater extent than I was. He will correct me if I err, basically, there was no business reason for this July 15th date. It was a date, as I understand it, which was geared towards creating the kind of time frame which would accelerate the acceptance of the plan and the solicitation of consent process so that there would be no delay or hang-up in that regard, rather than to have a later date which might suggest that the debtor, the

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3 Committee and creditors in general could
4 follow a more leisurely pace in proceeding
5 to confirmation.

6 Insofar as any business reason is
7 concerned, it is my understanding that was
8 not raised and not relevant.

9 THE JUDGE: To whom is the certi-
10 ficate payable?

11 MR. TREPPER: It is a Mangel's
12 credit endorsed to Mr. Ballaban. It was a
13 requirement of the Committee at the time
14 of delivery.

15 I would recall one other thing to
16 add to Mr. Cram's remarks, as I under-
17 stood and recall of the discussion leading
18 up to this letter.

19 It was projected on dollar figures
20 given to Mangel's and discussed among the
21 principals of the two companies that Fabric
22 Tree could not be expected to show any
23 profit or curtailing its operating losses
24 much before the middle or end of August
25 of '76, and that the basis for the

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July 15th date was to get an early confirmation as possible, and to put, or not to put a pressure tactic on the people in this case, and we had been to the Committee three different times and were concerned with the --

MR. SCHROEDER: This is a retail business and if we don't have proper stocking in this operation, your Honor, in the fall and for the Christmas season, then we would not be in a position to take over the operation. That was set forth in the negotiations and the date was very important for that particular reason.

We didn't want to take it over later than that date.

THE JUDGE: Has the Creditors Committee, Mr. Fabrizio, faced up to the question that has been raised by the Cole & Deitz people, the question of are they prepared to utilize self-help with respect to this money in the face of the unequivocal statements by the Mangel's counsel that

Fabric Tree

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3 the conditions of the deposit have not
4 been satisfied and any disposition of the
5 money would not be authorized and they intend
6 to sue the Committee or individuals involved
7 for any loss they suffer as a result of
8 that?

9 MR. FABRIZIO: On behalf of the
10 Committee, I will say to the Court that
11 the issue here is simply whether this Court
12 is going to permit Mangel's to walk away
13 with, and I mean all of the assets of this
14 debtor and to walk away from its bargain and
15 leave the creditors high and dry on the
16 basis of a technicality.

17 THE JUDGE: With all due respects,
18 Mangel's bargain was never brought before
19 this Court, the Committee and the debtor
20 chose not to.

21 The only thing that was ever
22 brought before the Court was a change in
23 a financing arrangement between a prior
24 purchaser and Mangel's.

25 The thing that troubles me is

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3 that the only function here of the Court,
4 as I see it, and this was troubling me
5 on the 15th of July, is to decide
6 whether or not to issue an order of con-
7 firmation based upon whatever pre-
8 conditions are necessary and one of them
9 being the deposit of money which has been
10 absolutely corrected and testified to.

11 We don't normally issue an order
12 of confirmation unless we have evidence
13 that the disbursing agent has enough funds
14 to satisfy the order of confirmation,
15 less any waivers that may have been filed
16 with the Court on deposit; so that without
17 beating around the bush here, assuming
18 that I was to wash my hands completely
19 of the question of any struggles or dis-
20 putes between Mangel's and the Committee,
21 et cetera, is the debtor in a position
22 here to confirm.

23 MR. FABRIZIO: I believe that
24 you have to make a determination as to
25 whether or not there has been a technical

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default under this agreement and whether --

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THE JUDGE: I don't think that is

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my job.

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MR. FABRIZIO: Then it is up to

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the Court to direct a deposit to be made

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with the disbursing agent and the chairman

9

of the --

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THE JUDGE: I will not direct any

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deposit to be made. I don't normally

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direct a deposit to be made.

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What happens normally is that, as

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part of a confirmation process, and you

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may contradict me if you want, among the

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papers submitted to the Court are the papers

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saying that the disbursing agent has been

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given sufficient funds in respect to the

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order which have to go in before the order

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is signed, the confirmation order, the

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schedules, et cetera.

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Is there any dispute here, as long

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as there are adequate assurances that the

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money is there?

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MR. CRAMES: The only answer to

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3 that, your Honor, and I suppose that
4 we might say that it is an unusual answer
5 and this is an unusual case, and perhaps
6 an unusual and unique procedure is re-
7 quired. If the Court were to determine
8 that the terms and conditions of the
9 Mangel's commitment are capable of satis-
10 faction today and were capable of satis-
11 faction on July 15th, the thrust of such a
12 determination would be that the commitment
13 to go forward was then and is now in full
14 force and effect and, based upon the con-
15 firmation in the Court which would be a
16 right of it with respect to the parties.

17 The escrowee would turn over to
18 the Court disbursing agent the time cer-
19 tificate of deposit.

20 I think there is another point
21 that has to be made, and I think it is an
22 important one, namely, the question of
23 whether the Court has the power and juris-
24 diction to proceed as I have suggested.

25 I think the answer to that is

Fabric Tree

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3 clearly yes. Notwithstanding the fact that
4 all that was submitted to you, your Honor,
5 was an application and an order which had
6 been reviewed by Mangel's counsel prior to
7 its submission since, obviously, it had to
8 be satisfied with that order in order to
9 proceed.

10 The submission of those papers in
11 and of themselves, by giving Mangel's a
12 security interest in all of the assets of
13 the debtor, which property is clearly sub-
14 ject to the exclusive jurisdiction of this
15 Court under Section 31, any and all ques-
16 tions, any and all disputes and any and all
17 issues with regard to the rights of the
18 property is something that this Court must
19 determine.

20 THE JUDGE: I have no problem with
21 that.

22 MR. CRAMES: Insofar as the certi-
23 ficate of deposit is concerned, it must be
24 kept in mind within whose possession it is.
25 The escrowee is a chairman of the first

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Fabric Tree

meeting of creditors before this Court and he is clearly an agent of the Court.

Anything within his possession is as within the jurisdiction of this Court as with any other officer of this Court.

I don't think there can be any question about that.

THE JUDGE: I don't see where this document puts anything into the possession of Mr. Ballaban. This is addressed to the Committee and not to him. It is stipulated by the Committee, by Ballaban, chairman.

I have been told up until this time and there has been a suggestion made that this is a personal deposit.

MR. FABRIZIO: No, it is held by the Committee, your Honor.

MR. CRAMES: The certificate of deposit is within his possession as the chairman of the official Creditors Committee.

THE JUDGE: What is the endorsement on it?

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Fabric Tree

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MR. FABRIZIO As chairman.

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MR. TREPPER: Mr. Lamm was the party
who endorsed the credit.

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MR. SCHROEDER: I am not sure about
that, your Honor.

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THE JUDGE: In any event, if one
were to make an application here for an
order of confirmation and the Mangel's
people were to oppose that application on
probably the only possible ground that
exists; namely, that the utilization of
the \$600,000 to fund the arrangement is vio-
lation of the various agreements and, there-
fore, the Court should not permit it to pro-
ceed either, then the basis of equity or
the plan is no longer feasible.

MR. ECHIKSON: We probably would
have to decide these questions. In terms
of deciding to what extent of the July 15th
date was an iron-clad cutoff and to what
extent with respect to Mangel's may have
caused any inexcusable delay and I don't
know, certainly, without getting into a lot

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of testimony here, because while you people have stated that they could have confirmed on it and Mangel's says that they could not confirm on the 15th. The fact of the matter is that whatever waivers were required in order to bring you down to the \$45,000 or the \$150,000 which were not on hand on the 15th -- what does the paper work look like on confirmation?

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MR. CRAMES: It is all done.

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THE JUDGE: What about any documents necessary to waive claims to take it down to the \$600,000?

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MR. CRAMES: I will tell you what I have and what remains to be done.

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The schedules are done, your Honor, the requisite affidavits, application and orders are done. Orders have been signed or are submitted awaiting signature by your Honor, effecting reduction in claims, and the figures that I have prepared are figures that take those orders into account.

THE JUDGE: Anything that was sub-

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mitted through yesterday has been signed.

MR. CRAMES: Fine; then the figures that I have are correct.

THE JUDGE: Or let's say any that came to my desk through yesterday are signed.

MR. CRAMES: All that remains to be done is to memorialize and file statements from the Creditors Committee, and a representative of that Committee is in court to testify as to what the Committee has indicated its willingness to do, to reduce the general claims to whatever is required to bring it within the \$3,000,000 number.

THE JUDGE: What is the authority of the Committee with respect to that?

MR. CRAMES: These are their own claimants.

THE JUDGE: I thought you said general creditors.

MR. CRAMES: They are reducing their own claims and not those of non-Committee members.

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THE JUDGE: What does the plan say about confirmation? Is there any reference to the \$600,000 in the plan?

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MR. CRAMES: None whatsoever.

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THE JUDGE: Is there a copy of the plan in court?

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MR. CRAMES: Yes.

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THE JUDGE: May I see it?

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MR. CRAMES: Yes, your Honor.

12

It is a straight fifteen per cent cash plan with priority and administration claims to be paid in full in cash.

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The only other papers, your Honor,

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would be those required by the five pro-

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fessionals whom I mentioned, which would

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effect a proportionate reduction in the

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allowance which you awarded them to bring

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the priority and administration claims

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within the \$150,000, and you have in

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court today three of those five pro-

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fessionals.

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THE JUDGE: If I were to entertain

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an order of confirmation, you would have

Fabric Tree

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3 to provide for all administration expenses
4 through the date of confirmation; would you
5 not?

6 MR. CRAMES: I would have to provide
7 for all administration expenses which have
8 accrued and which are unpaid and past due.

9 I exclude from my thinking, as I
10 always do, your Honor, ordinary operating
11 expenses which are, for example, there are
12 probably some July rents. There is a pay-
13 roll due today and there are probably a couple
14 of utility bills for the month of June, all
15 of which were ordinary operating expenses
16 which are paid in the regular course of
17 business.

18 A deposit for confirmation never
19 covers those.

20 If you are talking about a land-
21 lord on the premises that were vacated and
22 a lease disaffirmed six months ago and the
23 landlord has an administration claim, then
24 a deposit must be made to cover it.

25 The regular expenses that are

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Fabric Tree

current are payable by the D.I.P. in the regular course of business.

There is \$90,000 in the bank account which is far more than what is required to pay.

MR. ROSENBERG: The \$90,000 belongs to Mangel's --

MR. CRAMES: Slight correction. These assets are all assets of the Fabric Tree and unless there is a foreclosure on the sale they would buy in. They don't own the lease.

MR. ROSENBERG: All moneys are to be paid or turned over to Mangel's.

MR. CRAMES: The question is whether the conduct of the business since Mangel's came in on or about May 7, 1976 has been such as to permit the D.I.P., through its duly authorized officers, to make deposits of money in its general account and draw checks on that account for the payment of bills that do accrue.

I would hope that is not an issue,

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Fabric Tree

but it may be.

MR. ROSENBERG: If there is to be a confirmation, it will become an issue very quickly.

THE JUDGE: I will not decide this now. I will decide today what I will do about this.

What I would like to receive is some more precise statement as to exactly where the numbers stand.

It sounds to me like there is no problem from the point of view of creditors represented on the Committee or the professionals waiving or reducing claims to the extent necessary to bring it within the \$600,000.

There has been some rather loose talk about other numbers here which I don't think that anybody has a handle on.

MR. FABRIZIO: I think we have a handle on the numbers and we can present testimony with respect to what the numbers are.

Fabric Tree

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MR. CRAMES: I can tell you --

THE JUDGE: I want to know what
is in the \$150,000 other than the fees and
allowances which we have granted here.

MR CRAMES: There are administra-
tion claims filed and allowed of 10501.

There are administration claims filed
and under objection of 3,364.

There are fees and disbursements
of applicants for allowance as determined
by your Honor of 92,681.08.

I have calculated the salary and
expense funds, based upon the statutory
percentages, at 9,522.08, which is the
amount based upon the claims filed and allowed,
filed and under objection, and scheduled but
not filed.

The only other administration claims,
which in our view would impact upon the
\$150,000 number, are two landlord claims
representing locations closed which I ad-
verted to in another context a while ago,
one for \$8,331, and the other for \$6,898,

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Fabric Tree

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for a total of a bit over \$15,000.

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THE JUDGE: That adds up to a bit

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over \$15,000.

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MR. CRAMES: Yes; the only other

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items represent the priority claims filed

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and allowed of \$66,24 and priority claims

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filed and under objection of \$6,840.

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There is one priority claim sched-

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uled and not filed of some 286.

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You have a total there of approxi-

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mately \$75,000 or thereabouts, which brings

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the total fifty-five over..

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With the fees exceeding \$90,000,

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a proportionate waiver would bring it

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down to 150 or thereabouts.

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I might also add, your Honor,

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that the general claims require a cash

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deposit of approximately twenty or twenty-

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five thousand dollars over and the waivers

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which the members of the Committee have

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indicated their willingness to give would

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certainly take care of that with no prob-

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Fabric Tree

THE JUDGE: What is your position with respect to these other items of operating expenses post-July 15th or outstanding at July 15th in the ordinary course other than the contention that you made about the cash money?

MR. ROSENBERG: That is our position, your Honor, if it has to be paid with our money, I don't think that we are prepared to see it paid that way in order to produce a confirmation today.

THE JUDGE: None of this, of course, and let's face up to this for a minute, none of this touches upon whatever the contractual agreements are between the present owners and Mangel's concerning the transfer of the shares of Fabric Tree?

MR. ROSENBERG: That's correct.

THE JUDGE: And none of it in any way pertains to Fabric Tree's obligation to Mangel's and Mangel's position as a secured creditor with respect to the other advances which are in the realm of \$400,000-odd?

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Fabric Tree

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MR. ROSENBERG: Right, with a potential liability which would bring the total up to \$700,000.

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THE JUDGE: Off the record.

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(Discussion off the record.)

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THE JUDGE: I will adjourn this particular matter until 1:30 today. At that time I would like to have a specific report on what the possible filing schedule is for all of these papers.

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Don't take that as any indication as to my feelings about the disposition of this matter. I am concerned here very much by the fact that there was at least on the record a July 15th cutoff date.

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There, apparently, were indications significantly in advance of that that Mangel's had problems with the numbers, and also that Mangel's did not intend to go beyond July 15th if it was its legal right to hold to that date.

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MR. FABRIZIO: I don't know if that was so.

Fabric Tree

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3 MR. ROSENBERG: If there is a dis-
4 pute, your Honor, we can put testimony on
5 the stand.

6 THE JUDGE: I have the feeling,
7 and it is not based upon any kind of evi-
8 dence, but the posture in which the thing
9 was presented to me on the 15th, at least,
10 led me to believe that there were problems
11 on the table in connection with that con-
12 firmation for several days, if not several
13 weeks in advance of the 15th, and what I
14 am troubled about is that everything that
15 has been reported here today was doable
16 by the 15th.

17 To the extent that the Committee
18 members are prepared to waive or reduce
19 claims and to the extent that the pro-
20 fessionals are prepared to reduce allowances
21 to come to this magic number, and I see the
22 most would have been a dispute which could
23 have been decided by the Court concerning
24 whatever it was, five, sixty or seventy
25 thousand dollars of expenses that had been paid

Fabric Tree

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3 during the course of the Chapter proceeding,
4 that Mangel's said at the time was paid out
5 of their moneys from the bank account and,
6 therefore, should have been provided for
7 on confirmation.

8 Truthfully, I was not overly sympa-
9 thetic to that argument, particularly in
10 light of the fact that no money throughout this
11 period had ever been countersigned or gone
12 through Mangel's.

13 The thing that bothers me here is that
14 everything that is done today could have been
15 done on the 15th of July with equal ease.

16 MR. FABRIZIO: Your Honor, as counsel
17 correctly said, I was not a party to any of
18 the meetings.

19 I am advising the Court that what
20 the Committee has been told by the debtor;
21 Mangel's was never prepared to go over the
22 \$600,000 figure; however, when the Committee
23 asked the debtor why didn't they come there
24 before the 15th, the response was that the
25 debtor was given the impression that al-

Fabric Tree

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3 though Mangel's would hold them to the
4 \$600,000 figure, it would not hold them
5 to the 15th of July.

6 THE JUDGE: If that is correct,
7 then Mangel's may well have waived or
8 been guilty of excusable neglect, but what
9 they told you is not binding upon what
10 Mangel's says they did or did not do.

11 I don't want to waste any more time on
12 this. As far as I am concerned, we can deal
13 with this in court or in my chambers.

14 MR. CRAMES: I might suggest that
15 we start in your chambers.

16 THE JUDGE: I have a copy of this
17 document and I have a copy of the plan.

18 Do you want these back?

19 MR. CRAMES: You can keep either or
20 both of them, if you find them useful.

21 Your Honor, to put this in perspective
22 for the purposes of the record, this represents an adjourned hearing on confirmation
23 that was on this morning and which you
24 adjourned to 1:30 this afternoon, your Honor.
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Fabric Tree

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3 Off the record, there was some
4 discussion precipitated by questions that
5 you had posed relative to the transaction
6 between the debtor and Mangel's.

7 As a result of those questions
8 which -- off the record, if I may.

9 (Discussion off the record.)

10 MR. ROSENBERG: Your Honor, I ob-
11 ject to this Court's jurisdiction to deter-
12 mine the issues raised by the escrow agree-
13 ment and escrow deposit on the grounds
14 that the res, the escrow deposit is neither
15 owned by nor in the possession of the
16 debtor within the meaning of the Section
17 of the Act nor does the debtor have any
18 property interest therein whatsoever.

19 I recognize that you don't wish
20 to rule in advance on the jurisdictional
21 question and I am willing to accept your
22 procedural desires and not take an
23 interlocutory appeal, if the jurisdictional
24 issue were decided against my position.
25 However, I am objecting to the jurisdiction

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Fabric Tree

of this Court.

I am not waiving that jurisdiction in proceeding with an evidentiary hearing and, if it is ultimately decided against my position, I will have full rights to assert it on appeal.

THE JUDGE: You have no objection, do you?

MR. CRAMES: No, I would assume that you might want some law on the subject of jurisdiction.

THE JUDGE: It is my leaning here that I will uphold the jurisdiction of the Court to decide this without articulating all of the reasons here goes to the heart of the confirmation process and, if there is anything that I think that we have jurisdiction over here is the jurisdiction process, also that Mangel's is not a stranger to this proceeding because this, more or less, has been precipitated by the action and transaction that Mangel's has entered into.

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Fabric Tree

We are dealing with a subject that is uniquely before the Court.

Someone may feel different about it at a later date. You should proceed with the assumption that I will uphold the jurisdiction as to the extent where we go for this confirmation.

The thing you may appeal is merely an order of confirmation.

MR. ROSENBERG: I am willing to accept your tentative decision that you do have jurisdiction and proceed, so long as it is well understand and acknowledged by your Honor that by not taking an interlocutory appeal on the question of jurisdiction and going forward with the hearing, we have not waived any rights whatsoever.

THE JUDGE: I have no problem with that.

To answer Mr. Crames' question, the things that I remarked about earlier that I felt had to be touched upon here in order to make a determination of whether to go

Fabric Tree

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3 forward is, basically, answer to seven
4 questions: number one, can Fabric Tree
5 now proceed to confirmation with a \$600,000
6 deposit but for the July 15th condition;
7 number two, the question of whether
8 Mangel's waived the July 15th condition;
9 number three, was time of the essence in
10 the July 15th condition; number four,
11 does Mangel's somehow interfere with the
12 performance of the July 15th condition so
13 that they cannot enforce it; number five,
14 is Fabric Tree otherwise excused from per-
15 formance of the July 15th condition; number
16 6, is Mangel's otherwise estopped from in-
17 sisting upon the July 15th condition; number
18 seven, has there been any material adverse
19 change in the business of Fabric Tree since
20 July 15th.

21 To other possible questions that
22 were mentioned which may be deemed to be
23 excluded in the other was whether or not
24 Fabric Tree has acted in any way that pre-
25 cludes them from arguing that the July 15th

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Fabric Tree

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condition should not be strictly enforced

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and, finally, Mr. Fabrizio's point as to

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whether or not the Court should permit

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Fabric Tree, through the strict insistence

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on the July 15th condition when, coupled

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with the present security interest that

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it has in the assets of Fabric Tree,

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accomplish what were, at least, the under-

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lying results of the plan of arrangement

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as originally contemplated, except for the

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non-expenditure of the \$600,000.

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Do you want to proceed, Mr. Crammes?

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MR. CRAMES: Yes, with your permission

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Mr. Trepper and I are going to divide between

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us the questioning, because he is familiar

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with some parts more so than I, and I, vice

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versa.

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R I C H A R D

F E L N E R ,

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Called as a witness, having

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been first duly sworn by the

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Judge, was examined and testi-

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fied as follows:

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Felner

DIRECT EXAMINATION

BY MR. CRAMES:

Q Please state your name and address.

A Richard Felner, 1 Wellhouse Close, Mamaroneck,
New York.

Q Can you tell us whether you are an
officer of Fabric Tree?

A Yes, I am the vice-president and secretary.

Q For how long have you been an offi-
cer?.

A Approximately eleven years.

Q Who are the other officers of
Fabric Tree?

A There is one other officer, Mr. Richard
Echikson, the president, who has been the president
for approximately eleven years.

Q That is the time during which
Fabric Tree has been in business?

A Correct.

Q What is the business of Fabric
Tree?

A The operation of retail fabric stores sell-
ing fabrics.

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Felner

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Q How many such stores are there at

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the present time?

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A At the present time there are thirty such
6 stores in operation.

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Q Thirty?

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A Yes, thirty.

9

Q Mr. Felner, are you familiar with

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the plan that has been proposed by Fabric Tree pro-
11 viding for the payment of administration and priority
12 claims upon confirmation and the payment of fifteen
13 per cent paid to general unsecured creditors?

14

A Yes, I have seen it.

15

Q I show you a copy, and ask you whether

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that is a copy of the plan that has been filed by
17 Fabric Tree in this proceeding.

18

A That is such a copy.

19

MR. CRAMES: The original is on file

20

with the court.

21

I would ask that it be deemed marked

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as Debtor's Exhibit No. 1.

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(Plan filed by Fabric Tree deemed

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marked Debtor's Exhibit 1 in evidence, as
25 of this date.)

Felner

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Q

Are you familiar with the claims which have been filed in this proceeding by creditors and with the schedules which were filed in this proceeding by Fabric Tree?

A Yes.

Q

Have you discussed with our office and are you familiar with such claims and such schedules and, based upon the claims as filed and the schedules, can you tell us, please, the moneys that are required to confirm this plan which is Exhibit No. 1 and, if you would please, break down the claims into their various categories, priority claims, administration and general claims?

A Based upon my familiarity with the claims as filed, the schedules, a priority claims filed and -- I don't have a total figure of claims. I have an amount required to pay such claims of fifteen per cent.

Q

The plan provides for the payment of priority claims in full?

A I beg your pardon. Priority claims filed and allowed are \$66,459.54.

Priority claims filed and objected to are \$6,840.45.

Felner

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Priority claims scheduled but not filed are
\$286.65.

Q Can you tell us, please, with re-
spect to the general unsecured claims filed and al-
lowed, what fifteen per cent in cash comes to?

A \$354,091.80.

Q Can you tell us with respect to claims
which were filed and which are being objected to, what
fifteen per cent comes to?

A It comes to \$11,777.37.

Q With respect to general creditors
who are scheduled in the schedules filed by the
debtor but who have thus far not filed claims, can
you tell us what fifteen per cent of that comes to?

A Based upon our calculation, it comes to
\$5,061.40.

Q With respect to administration
claims filed and allowed, can you tell us, please,
what the total of that is, keeping in mind that
they are to be paid in full in cash upon confirma-
tion?

A That amount, according to my familiarity
with the records, is \$1,118.04.

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Q Can you tell us whether there are any administration claims filed and which are under objection and, if so, what that amounts to?

A There are, and that amounts to \$3,364.95.

Q Do you have a total of what you have given us so far?

A \$539,500.20.

Q Based upon the determination that has been made by the Court with respect to fees to all applicants for allowances and disbursements which the Court has allowed, do you have a total as to the cash required to pay such expenses?

A You want the total for --

Q The total for the fees as allowed by the Court and disbursements.

A That would be \$92,681.08.

MR. CRAMES: There are two other items in that mathematical computation which our office made, and one is the amount which would be the maximum payable to the clerk of the court for the salary and expense fund, and that has been calculated by our office at \$9,525.26,

Felner

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3 which I would state how it is computed.

4 It is based upon the aggregate of all
5 of the priority claims filed and allowed,
6 filed and objected to, scheduled but not
7 filed, plus the fifteen per cent for all
8 the general claims as filed and allowed, filed
9 and objected to and scheduled but not filed.

10 This comes to a total of \$535,017.21;
11 three per cent of the first \$100,000 is, of
12 course, \$3,000; one and a half per cent of
13 \$435,017.21 is \$6,525.26, making the figure
14 of \$9,525.26, which I mentioned a moment
15 ago.

16 This, of course, is a maximum, it will
17 go down, based upon reductions that may be
18 effected and scheduled, creditors who may
19 never file claims. That is the figure as
20 of today.

21 In addition, we have made an esti-
22 mate, your Honor, of a disbursing agent's
23 fee of \$3,000, which is, basically, one-half
24 of one per cent of \$600,000, which is the
25 maximum commission paid to a custodial

Felner

receiver under the Act, and there are two items for which I have not made provision.

They are special charges which ordinarily would not be more than a hundred dollars or \$150 in a case of this size, and whatever moneys may be outstanding to the court reporter.

Without those two items, Mr. Felner, do you have a total of the figures that I have thus far read into the record and those to which you have testified to?

THE WITNESS: Yes. The total of all those items is \$644,706.54.

Q Mr. Felner, the Fabric Tree has been, since this petition was filed, operating its business under the authority of the order signed by this Court at the inception of the proceedings; is that right?

A Correct.

Q Is the business still being operated?

A Yes, it is.

Q Are there any unpaid obligations

Felner

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3 of the D.I.P. other than those which we have already
4 talked about which are not current obligations and,
5 if so, can you tell us what they are and what they
6 amount to?

7 A Yes. There is an unpaid obligation --
8 there are unpaid obligations to two landlords who
9 are different entities but the same landlord in the
10 amount of, I believe that your office has the figures.
11 It is in an amount of approximately \$15,000.

12 Q \$15,000?

13 A Yes.

14 Q These are for stores that have been
15 closed?

16 A Yes, and these charges represent U and O.
17 That \$15,000 is partially a disputed amount.

18 Q But that is the amount being claimed
19 by the two landlords combined; is that correct?

20 A Correct.

21 Q Other than that, are there any ex-
22 penses which are not of a current nature which remain
23 unpaid?

24 A Yes, there is an expense of, I believe, that
25 is owed for equipment rental in the amount of \$2,400,

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Felner

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3 which is not a current expense.

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Q Other than that, are there any ex-
5 penses that may be open' current items such as for
6 rent, payroll, utilities and the like, which ordi-
7 narily are paid in the regular and ordinary course?

8

A There are items such as these open; rent,
9 utilities and payroll.

10

Q Which would be paid in the regular and
11 ordinary course of business; is that correct?

12

A Yes, that's correct.

13

Q Can you tell us what the bank balance
14 is at the present time, approximately?

15

A I don't have a bank balance as of today's
16 date, but I believe the bank balance as of yester-
17 day's date was, taking into account all the various
18 bank accounts, approximately \$122,000, of which
19 approximately \$30,000 was in the tax in trust account
20 and earmarked for taxes.

21

Q Which would leave approximately
22 how much in the general account?

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A It would leave approximately \$90,000.

24

Q Is that --

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A There may be additional amounts in a state

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of transit, but I couldn't state accurately.

THE JUDGE: Excuse me. The balance that you say is after taking out all outstanding checks, whether they have been presented for payment or not, yesterday's figure of \$122,000, is that after providing for checks that were issued out?

THE WITNESS: I believe it is.

Q Is the approximately \$90,000 in the general account more than sufficient to cover whatever current expenses may be due and owing and which would be paid in the regular and ordinary course of business?

A I would say that it is sufficient to cover those amounts, yes, what would be due and owing in the normal course of business.

MR. CRAMES: Your Honor, all that I would like to add to what Mr. Felner has testified to, and this is not in the nature of evidence that I can adduce from him as to the effect, as we had advised you this morning, that at a

Felner

meeting of the official Creditors Committee yesterday at New York Creditmen's Adjustment Bureau, the ten members of the Creditors Committee voted unanimously that they would, as individual creditors, reduce their claims by whatever was necessary to bring their claims down to the aggregate of \$3,000,000.

Mr. Fabrizio, who is counsel for the Committee, and several members of the Committee are present in court and, if need be, they can and will corroborate that.

Also, your Honor, the Committee determined, and various professionals whose names I read into the record this morning agreed, that they would proportionately reduce the allowances as fixed by your Honor by whatever was required to bring the aggregate of the priority and administration claims within the \$150,000 figure.

THE JUDGE: Am I correct that the

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amount of the three numbers that Mr.
Felner mentioned on the unsecured comes
up to \$451,430-odd?

MR. CRAMES: It would be 354 plus
101, plus five.

THE JUDGE: That is 461.

MR. FABRIZIO: 461.

THE JUDGE: Okay. 461.

MR. CRAMES: The difference would
be eliminated, as I indicated.

With respect to the balance --

THE JUDGE: That is only \$11,000-odd.

MR. CRAMES: That's correct.

On the administration and priority,
which would be the 644 minus the --

THE JUDGE: It is approximately
\$183,000.

MR. CRAMES: And if you added to
that the other unpaid non-current administra-
tion expenses which Mr. Felner spoke of,
you have another \$16,000, approximately
a little under \$200,000 in the aggregate.

Based upon the proportionate reduction

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3 which the professionals have agreed to
4 give, their fees aggregating, as they do,
5 more than \$90,000, that \$50,000 maximum
6 excess would be eliminated, thereby
7 bringing the figure down to \$150,000,
8 your Honor.

9 THE JUDGE: It is your intention
10 that the balance of these obligations, the
11 current ones, would be paid out of the
12 current funds?

13 MR. CRAMES: That's correct, your
14 Honor.

15 THE JUDGE: You would not use any
16 of the current funds of the debtor to pay
17 any of the other administration or priority
18 claims?

19 MR. CRAMES: That's correct.

20 By "other," you are referring to
21 the current obligations. The current ob-
22 ligations, rent, payroll and the like
23 would be paid out of the funds and general
24 account.

25 What we have done, your Honor, is

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to ascribe to the \$150,000, the total of all of the priority claims filed and scheduled, the administration claims filed and scheduled and the non-current items that Mr. Felner testified to specifically, the equipment, lease rentals, which are non-current, and the two landlords.

THE JUDGE: All of the current operating expenses you would intend to have satisfied all of the current operating bank balance of the debtor?

MR. CRAMES: Yes, your Honor.

Your Honor, I want to cover another point with Mr. Felner and then I will let Mr. Trepper pick up.

Q Since July 15, 1976, has the D.I.P. been operating its business?

A Yes, it has.

Q Has there been any material adverse change in the business or in the assets or liabilities of the debtor since July 15, 1976?

A Not to my knowledge, no.

Q Have you been active in this business

Felner

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3 since July 15th?

4 A Yes, there has been no material adverse
5 change.

6 MR. FABRIZIO: I would like to state
7 that at the meeting yesterday, your Honor,
8 a motion was made that the ten members of
9 the Committee, just acting on behalf of
10 themselves, agreed to reduce their claims
11 to the extent necessary to bring the total
12 general claims down to \$3,000,000, so that
13 the fifteen per cent would be the \$450,000.

14 That motion was unanimously carried.

15 I was authorized to state that on
16 behalf of my firm, the secretary to the
17 Committee, the New York Creditmen's Adjust-
18 ment Bureau and Clarence Rainess, who has
19 a representative in court, would agree to
20 waive their fees to bring the claims down
21 to the \$150,000 limitation.

22 MR. ROSENBERG: I wonder if it
23 might make for a more understandable record
24 if we could handle the questions that you
25 posed one at a time; in other words, allow

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me to cross-examine.

THE JUDGE: Yes, I was going to
let you do that.

MR. CRAMES: Off the record.

(Discussion off the record.)

CROSS-EXAMINATION

BY MR. ROSENBERG:

Q Mr. Felner, I believe you testified
that there is a certain amount of outstanding lia-
bilities of the D.I.P. which are not covered by
the schedules, the landlord claims, for example,
et cetera.

I wonder if we can run through
those in more detail. What is, as of today, the
overdue rent obligation of the debtor or U and O,
if you will, either for stores where the lease
is in the parent, the debtor or for obligations
for subs for rent which is guaranteed by the debtor?

A The figure for current U and O unpaid
for stores either occupied by the parent or occupied
by subs whose leases are guaranteed by the parent;
is that your question?

Q Yes, that is the question.

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3 A You will have to understand that some of
4 these expenses for rent and the categories that
5 you had suggested have very possibly been paid in
6 recent periods and my figures might possibly not
7 be up-to-date, but I would say those amounts are
8 approximately \$35,000.

9 Q Basically the same question, Mr.
10 Felner, as to utilities. What utility expenses are
11 outstanding?

12 A You are talking through the present date?

13 Q Yes.

14 THE JUDGE: In terms of the rent
15 you said overdue?

16 MR. ROSENBERG: The rent currently
17 due and owing; in other words, rent which
18 has become due as of July 27th which,
19 presumably, means July rent being payable
20 on July 1st.

21 MR. CRAMES: I think the Court
22 would want to know whether these are July
23 rent.

24 THE WITNESS: They are, essentially,
25 July rent.

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Q The same question with respect to
4 July or earlier utility bills which are outstanding
5 as of now.

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THE JUDGE: Bills and not accruals?

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MR. ROSENBERG: Yes, sir.

8

A The figure on utilities through the current
9 date would be, again, approximately \$5,000.

10

Q What about for the same period of
11 time billed for July or prior for travel and enter-
12 tainment expense which are outstanding?

13

A That would be approximately \$1,500.

14

Q For the same time period outstanding
15 advertising expenses?

16

A That would be approximately \$3,700.

17

Q For the same time period outstand-
18 ing maintenance expenses?

19

A That would be approximately \$1,200.

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Q For the same period group insurance
21 expenses?

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A That would be approximately \$261.

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Q For the same period telephone ex-
24 penses?

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A That would be approximately \$278.

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Q For the same period equipment rental expenses?

MR. CRAMES: Excluding what he already testified to?

MR. ROSENBERG: Yes.

A That would be approximately \$2,000.

THE JUDGE: Is that July bills?

MR. ROSENBERG: Or earlier.

A On that item, it is possible that may also be included as a general claim. I would have to --

Q A general claim, a claim arising prior to the filing of the Chapter XI?

A My information is not complete here. I would say that \$2,000 figure is composed of partly current expense and partly older than current expense, but not pre-petition.

Q Post-petition expense, in any event?

A Correct.

Q What about the same question with respect to Merchant Association dues?

A The amount due would be approximately \$1,200.

Q What is currently or past-due

Felner

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with respect to sales taxes?

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A Approximately \$6,400.

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Q What about taxes other than sales taxes?

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A Are you talking about taxes relating to the parent in the case of tax and sales tax, is your question with respect to tax of Fabric Tree, Inc.?

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10

Q No. Let's talk about the whole ball of wax. There may be personal liability there; stockholder liability.

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A The records of the company as of this recent date indicate a liability of taxes of the Fabric Tree, Inc. and of various subs, both active and inactive, of \$44,600.

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Q I see that you are reading from a schedule. I ask you if there are any additional liabilities resulting from the closing of stores which have not been paid other than the landlord claims that we have already mentioned.

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A Closing of stores during what period?

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Q As of July 3, 1976. That is after the filing of the Chapter XI and up to today's date.

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A Other than landlord liabilities?

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Q Other than the two rents or U and O

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claims to which you have already testified. Are

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there utility bills outstanding from closed stores in

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addition to the ones that you have covered in your

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other schedule?

8

A I don't know.

9

Q I show you a schedule and I ask

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you if you are familiar with it, either through your

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own preparation or through preparation by a member

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of your staff.

13

A What you have shown me, a schedule relating

14

to liability of sub corporations.

15

Q Is Fabric Tree --

16

A It is --

17

Q Sorry.

18

A There are a number of erasures on it.

19

I am not sure that I understand the question.

20

Q The question is: are there any addi-

21

tional liabilities incurred by Fabric Tree, D.I.P.,

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either directly or through guarantee from the closing

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of stores other than the two U and O claims already

24

mentioned?

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A Well, I can answer it this way: you have

Felner

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3 shown me a schedule listing utilities due, amounts
4 due, utilities covering both stores closed by the
5 parent company, the Fabric Tree, Inc., and stores
6 closed by certain subs.

7 Q Could you estimate the parent
8 liability on closed stores from that schedule?

9 A Could I estimate?

10 Q Yes, from that schedule, either
11 directly or through guarantee.

12 A The parent company has not guaranteed
13 any liabilities to utility companies, phone com-
14 panies, taxing authorities and the like.

15 Based upon the schedule which you have
16 presented to me, it appears from this schedule which
17 you have presented to me the --

18 MR. FABRIZIO: Your Honor, I
19 don't know who that schedule was prepared
20 by.

21 THE WITNESS: I don't either.

22 MR. FABRIZIO: How can he testify
23 from something that he has never seen?

24 Q You have seen that schedule before?

25 A No, not in this form. The total is \$4,000 and

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Felner

it is crossed out and there is \$10,000.

Q Other than that cross-out, have
you ever seen that schedule before?

MR. CRAMES: I have not interposed
an objection. I think that one must be
made. If counsel wants to ask questions
of the witness requiring his own knowledge.
I think the question should be stated
that way and not in reference to a schedule
that has not been identified.

THE JUDGE: Excuse me. I didn't
understand that Mr. Rosenberg was asking
Mr. Felner to read numbers off that
schedule. I understood that he gave him
the schedule possibly to refresh his
recollection.

I have been looking to the answer
from Mr. Felner here of his own knowledge.

MR. CRAMES: Fine, if he knows,
fine.

MR. ROSENBERG: I don't believe
that he testified to anything not within
his own knowledge.

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THE JUDGE: If there is any misunderstanding, then correct us.

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THE WITNESS: No, thus far I have testified like that.

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MR. FABRIZIO: The witness started to say something according to the schedule.

8

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Q Does the schedule jog your memory as to figures implicit in my question?

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A No, it doesn't.

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Q You have no recollection whatsoever as to any additional obligation of the debtor incurred on account of closed stores? Let me ask it this way: do you have any recollection that there are any additional obligations of the debtor because of closed stores?

A I would say that there are, and that they would total \$4,000.

THE JUDGE: This is either direct obligation of Fabric Tree or obligation of subs that are guaranteed by Fabric Tree?

THE WITNESS: Correct.

Q Approximately \$4,000?

A Correct.

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Felner

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Q Mr. Felner, is a Fabric Tree pay-

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roll to be made this week?

5

A Yes, it is.

6

Q Approximately how much is that pay-

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roll?

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A Approximately \$22,000.

9

THE JUDGE: Gross?

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THE WITNESS: Gross.

11

THE JUDGE: Does that include the

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company contribution on Social Security

13

and other taxes?

14

THE WITNESS: No, it doesn't.

15

THE JUDGE: That would be, roughly,

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another thousand-odd dollars?

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THE WITNESS: That would be, roughly,

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another \$4,000.

19

Q Another \$4,000?

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A Yes, another \$4,000.

21

THE JUDGE: I don't understand

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the \$4,000. What are you including in

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the \$4,000?

24

THE WITNESS: It would be, roughly,

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\$1,200.

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Felner

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Q \$1,200?

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A Yes.

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Q Am I correct, Mr. Felner, that

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you have testified that the bank balance of the

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debtor, including the tax trust account, is \$122,000?

8

A Correct, and I indicated that was as of

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transfers received through Friday recorded yester-

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day, and there may be additional moneys in transit.

11

MR. ROSENBERG: I submit that the

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figures that the witness has just testi-

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fied to comes to \$130,700.

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THE JUDGE: Excuse me, I have a

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question.

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This other tax of \$44,600 --

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THE WITNESS: The question that

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Mr. Rosenberg presented was what were

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the other taxes of Fabric Tree, Inc., and

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all of its subs.

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THE JUDGE: I don't want to get

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off to apples and oranges here. I want

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to stay with the same fruit.

24

Am I correct in assuming that,

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to the extent that you have been incurring

Felner

any kind of employee-related tax or other tax, the money has been segregated currently?

THE WITNESS: That's correct.

THE JUDGE: What is this \$6,400 in sales tax? Is that the current week?

THE WITNESS: I believe that is the sales tax obligation that was due for the current week as of the date schedules were prepared and that moneys were deposited in the tax and trust account.

THE JUDGE: What is the \$44,600?

THE WITNESS: I believe that represents a combination of all kinds of taxes owed by the Fabric Tree, Inc. and all of its subs.

THE JUDGE: Do you mean franchise tax?

THE WITNESS: Yes.

THE JUDGE: That is not a number that Fabric Tree is obligated for?

THE WITNESS: No, I don't believe that it is. It would represent withholding

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tax, et cetera.

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THE JUDGE: This, I assume, is all
post-petition?

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THE WITNESS: Post-petition.

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THE JUDGE: You said that there
were \$30,000 in the tax and trust account
which, I assume, includes partially sales
tax?

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THE WITNESS: Yes.

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THE JUDGE: You have named here
\$50,000 or \$51,000 between current sales
tax and this other tax category. What is
the difference? You have accounted for
\$6,400 in sales tax. Do you have anything
in payroll taxes? You don't because you
testified that on the \$22,000 which is a
gross payroll, exclusive of the company
Social Security contribution.

21

THE WITNESS: Yes.

22

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THE JUDGE: What is in this other
\$14,600, if you know?

24

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THE WITNESS: I believe it rep-
resents various types of taxes of the

1 Felner

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3 various sub corporations, namely, corporate
4 franchise taxes, unemployment contribution
5 tax and withholding tax.

6 THE JUDGE: Are you running sep-
7 arate payrolls on individual subs or are
8 you running one payroll?

9 THE WITNESS: We run one payroll,
10 but it is by sub. It is identified by sub.

11 THE JUDGE: You are maintaining
12 the separate entities?

13 THE WITNESS: Yes.

14 MR. ROSENBERG: I believe that the
15 subs have no funds except what the debtor
16 gives it.

17 THE JUDGE: There are a lot of
18 companies functioning that way.

19 MR. ROSENBERG: To be sure.

20 THE JUDGE: Both in and out of this
21 court.

22 Q Mr. Felner, do you know whether
23 Fabric Tree and Mangel's ever entered into a loan
24 agreement whereby Mangel's agreed to lend moneys to
25 Fabric Tree?

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A Yes, Fabric tree did.

THE JUDGE: Do you want to take this up for the first time?

MR. ROSENBERG: Your Honor, I intend to bring it up to show that the \$600,000 is not sufficient as a deposit.

THE JUDGE: Okay.

Q I ask you to identify this document, if you can, Mr. Felner.

A Yes, this is the loan and security agreement that Fabric Tree entered into with Mangel's.

THE JUDGE: Do you want to mark it?

MR. ROSENBERG: Yes.

(Loan and security agreement marked Mangel's Exhibit 1 in evidence, as of this date.)

Q I would ask you to read into the record Paragraph 8 of this agreement.

THE JUDGE: You just introduced the entire document.

MR. ROSENBERG: I would like to ask him some questions about Paragraph 8.

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Q Does the agreement provide, as you understand it, that Mangel's is to receive all collections of moneys from the operation of the business of Fabric Tree?

MR. CRAMES: Your Honor, I think the agreement speaks for itself.

MR. ROSENBERG: That is why I wanted it read.

THE JUDGE: I will sustain the objection. If you are asking him to give a legal interpretation of the agreement.

MR. ROSENBERG: That is why I want it read, but I will do it another way.

MR. CRAMES: I would still object.

MR. ROSENBERG: I will withdraw the question.

THE JUDGE: No one is going to quarrel with this Paragraph 8 or what it says.

Q To your knowledge, did Mangel's recently demand that all funds from the operation of Fabric Tree be turned over to Mangel's pursuant to the terms of the loan agreement?

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MR. CRAMES: Your Honor, I have an objection only to the form of the question because of the word "recently."

If he is talking about a course of dealing which may have been changed, he should give the Court what that course of dealing was.

THE JUDGE: Was the demand in writing?

MR. ROSENBERG: Yes.

THE JUDGE: Ask him if he received it.

Q Have you received such a demand?

THE JUDGE: Do you have the piece of paper?

MR. ROSENBERG: I believe that Mr. Crames does.

THE JUDGE: Is that that yellow slip of paper that was just handed across the aisle?

MR. CRAMES: I believe it is.

THE JUDGE: I guess the answer to the question is no?

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MR. ROSENBERG: He doesn't know.

THE JUDGE: He hasn't received
it.

MR. ROSENBERG: Then I am done
with questioning the witness at this time.

I will state that Mangel's has
made demands that the funds, pursuant
to the loan agreement, be turned over and,
therefore, even if they were adequate to
pay all the administration funds which, I
believe, you will see from my questioning of
this witness, they were not, anyway, they
are no longer available for that purpose.

THE JUDGE: When was the demand
made?

MR. ROSENBERG: About fifteen min-
utes ago in writing.

THE JUDGE: And delivered by whom
to whom?

MR. ROSENBERG: By the president
of Mangel's to counsel for Fabric Tree.

THE JUDGE: Is that the demand?

MR. CRAMES: Yes.

Felner

THE JUDGE: I would like it marked.

(Mangel's demand for funds, pursuant to the loan agreement, marked Court's Exhibit 1 in evidence, as of this date.)

MR. ROSENBERG: Based upon the record, I believe that even without that demand, the moneys would not have been sufficient.

THE JUDGE: Was that delivered during the pendency of the hearing?

MR. ROSENBERG: Yes.

THE JUDGE: Are you taking the position that money is unavailable to the debtor?

MR. ROSENBERG: Yes.

THE JUDGE: It is based upon this demand?

MR. ROSENBERG: Yes.

THE JUDGE: That was made during the course of the hearing here?

MR. ROSENBERG: Yes, sir.

MR. CRAMES: Your Honor, on that point, a few questions, please.

Felner

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REDIRECT EXAMINATION

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BY MR. CRAMES:

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MR. ROSENBERG: The president of the debtor just pointed out to me that prior demands had been made, although not in writing.

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THE JUDGE: You can put him on the stand and you can offer anything that you want in writing.

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Q With respect to the Mangel' exhibit No. 1, which is the loan and security agreement, Mr. Felner, you are aware, are you not, of the fact that an order was entered by this Court on May 7, 1976, authorizing advance by Mangel's and authorizing the grant to Mangel's of a security interest, are you not?

A I am aware of that.

20

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Q With respect to the Court order and the loan and security agreement which was entered into between the parties pursuant to the authority granted in that Court order, could you tell us, please, how moneys realized from the sale of inventories have been handled by Fabric Tree as D.I.P. since that.

Felner

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order was entered into and since the security agreement was entered into? Tell us the procedure that the D.I.P. has been following.

A Since the date of the entry of that order, the D.I.P. has collected moneys from its operations, local bank accounts, and transferred such moneys into its primary bank account.

Q Where are these primary bank accounts?

A In various banks in New York City and has paid all operating expenses that the D.I.P. was in a position to pay during the period that you have referred to from the date of the entry of the order.

Q Who has been signing the checks on behalf of Fabric Tree as D.I.P.?

A One of the -- one or another of the officers of the Fabric Tree, Mr. Echikson or myself.

Q Have any checks been signed by anyone other than the two of you?

A No.

Q So that all moneys received have gone into the general account and disbursements have been made from those general accounts?

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Felner

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A That has been the procedure and pattern that has been established by us, yes.

4

5

Q

6

Does this procedure differ from that which was followed prior to the execution of the loan and security agreement with Mangel's and the entry of the Court order of May 7th?

7

8

9

A No.

10

Q

11

Is this not, in fact, the same procedure that you have been following since the Chapter XI petition was filed?

12

13

A Yes, it is.

14

Q

15

Have you been in communication, has Mr. Echikson been in communication with representatives of Mangel's since May of '76?

16

17

A We have been in constant communication with representatives of Mangel's; officers of Mangel's, and have been in very close communication, we have at the request of Mangel's moved our entire office and accounting facilities into Mangel's corporate office and are in very close contact with them.

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Q Is it fair to say that as of your own knowledge that representatives of Mangel's have

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Felner

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been aware of how moneys have been collected, deposited
and disbursed?

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A Yes, that is fair to say.

6

7

Q Is there any question in your mind
about that?

8

A No.

9

10

Q You mentioned in response to some ques-
tions asked by Mr. Rosenberg that there are due and
owing various current obligations, including moneys
for rents, utilities and the like, which I have not
checked his addition, which does come to something
between 125 and \$135,000 on a fat count.

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You also indicated that there are,
in addition to the moneys presently on deposit, moneys
in transit.

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Now, do you reiterate your prior
testimony on direct testimony that the moneys on
hand, plus the moneys constantly being generated
from the operation of the business, are sufficient to
pay these obligations as they mature?

23

24

25

THE JUDGE: Excuse me. It is
my understanding that all of the testi-
mony has not been directed to obligations

1 Felner

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3 that will mature, but to obligations that
4 are currently payable.

5 MR. ROSENBERG: The only conceivable
6 exception to that would be the payroll
7 which doesn't become payable until to-
8 morrow.

9 THE JUDGE: That we understand.
10 Everything else is concerning itself with
11 bills in the house?

12 THE WITNESS: Yes, essentially,
13 your Honor. There are -- I have also
14 testified to certain expense that we
15 may not have bills on, but we --

16 THE JUDGE: Like what?

17 THE WITNESS: For example, adver-
18 tising bills which we may not have actually
19 received.

20 Q I believe that the Court and I was
21 under the impression that the amounts that you
22 testified to in response to counsel's questions rep-
23 resented bills actually received. In fact, the
24 Court said that these were bills received and not
25 accrued. And your response was affirmative. Were

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Felner

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all of these obligations paid in the past tense?

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THE JUDGE: To the extent that you

are talking about a rent bill, if you get a
bill by the 10th of the month or whatever
it is, that is what we are talking about;
utilities, et cetera?

THE WITNESS: Yes, what I have
testified to are bills that have been
actually received.

Q Of the moneys that are already in
deposit in the company's accounts aggregating that
\$122,000, approximately, that represents receipts
realized from the sale of inventories in the stores
through what date; in other words, how long does it
take for store receipts to be transmitted into the
regular accounts?

A At the request of Mangel's, we have re-
cently changed our system which was a system of
transferring via telephonic transfer which gives
us credit for the money within two days to a system
of drawing upon our local accounts via depository
transfer checks.

This change in system which was at the

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Felner

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request of Mangel's has, I would say, it has made
the transfer somewhat slow, but --

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Q What I am getting at is whether
the \$122,000 on deposit reflects all receipts realized
from the proceeds of sales of inventory through
yesterday or whether it represents proceeds realized
from sales through last Saturday or last Wednesday,
or whatever.

A I would say that it represents proceeds
of the sale of inventories through last Saturday.

Q The point of my question is to
ascertain the time gap, if any, between the realization
of moneys at the store level and they being
deposited in the account of the debtor. What does
this \$122,000 include in terms of store level?

THE JUDGE: If you know.

A I believe it represents receipts through,
transfer of receipts through some period of last
week. I can't accurately say whether the rents,
a transfer of receipts of inventories sold through
last Wednesday, Thursday or Saturday, because of
the multiplicity of stores and the nature of the
transfers.

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Felner

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THE JUDGE: You could have received the transfers from one store location without having received the transfers from the other?

THE WITNESS: Correct. In our main depository may have received the transfers, but not advice of the transfers; so I think that it is fair to say that there are additional moneys realized today.

Q Is Saturday a better than usual sales day?

A Yes.

Q So that if the \$122,000 did not include all sales from Saturday, there would be additional moneys to be forthcoming shortly?

A Yes.

THE JUDGE: Are you open on Sunday in any locations?

THE WITNESS: Yes, approximately ten locations.

MR. CRAMES: Your Honor, unless counsel has any redirect, I have nothing

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Felner

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3

further on this facet.

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MR. ROSENBERG: I do, your Honor,

5

a couple of questions.

6

RE CROSS-EXAMINATION

7

BY MR. ROSENBERG:

8

Q

Mr. Felner, the \$122,000 of which

9

you have been speaking, am I correct in stating that

10

it is in a number of bank accounts?

11

A

Yes, I believe it is.

12

Q

Is one of those accounts at the

13

First National City Bank?

14

A

Yes.

15

Q

Approximately how much money is

16

in that account?

17

A

I don't have that information at hand.

18

Q

Would it be approximately \$40,000,

19

give or take?

20

A

I would have to refer to our company

21

records to be able to answer that.

22

Q

Is it more than \$20,000?

23

MR. CRAMES: He doesn't know.

24

A

I don't know.

25

THE JUDGE: Does that make a

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Felner

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3

difference?

4

MR. ROSENBERG: Yes, I believe

5

it does, your Honor. Well, let me go

6

forward and then we can decide.

7

Q Are transfers from that account

8

subject to any restriction currently?

9

A Yes, there is a resolution. There was a

10

resolution passed by the board of directors of the

11

company stating that transfers from the account, I

12

believe you are referring to which we refer to as

13

the regular account at First National City, the

14

transfer of those funds from that account may be

15

made payable only to Mangel's Stores.

16

Q In other words --

17

A And that resolution was requested by

18

Mangel's.

19

Q As of now, if I understand you,

20

am I correct that these funds cannot be used for

21

the writing of checks for the paydown of administra-

22

tion expenses?

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MR. CRAMES: I think that calls

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for a legal conclusion and it is objection-

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able.

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Felner

MR. ROSENBERG: Then I withdraw
it, your Honor.

THE JUDGE: When was that reso-
lution put in?

MR. ROSENBERG: July 5th or 6th.

THE WITNESS: I believe it was
July 6th.

Q That raises another question, Mr.
Felner. I believe you testified on direct examina-
tion that Mangel's controlled or at least reviewed
the payment of administration expenses or current
obligations of --

THE JUDGE: I didn't hear that
testimony. I think that all he testified
was that they were aware that they were
using the general funds derived from the
general funds during the regular course for
the payment of operating expenses.

THE WITNESS: Correct, your
Honor.

Q Did Mangel's, at that time that
Mangel's made advances to Fabric Tree, review in
advance disbursements for the purposes just stated?

Felner

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3 From the first infusion of cash by Mangel's into
4 Fabric Tree, did Mangel's review in advance dis-
5 bursements made by Fabric Tree to pay operating
6 expenses?

7 A No.

8 Q At what time did it begin to review?

9 A I am not certain of the date. I believe it
10 was a date subsequent to July 1st.

11 Q Were advances made prior to that date
12 by Mangel's?

13 A Yes.

14 Q Did Mangel's request the review
15 prior to the beginning of July?

16 A I can answer it in this way: Mangel's did
17 not, in writing, request review of these payments.

18 Q Did Mangel's not request of you
19 permission to review disbursements prior to the
20 time that they were made and did you not refuse
21 that permission?

22 A Mangel's did request the right to review
23 disbursements that were made at sometime in July.

24 Q It never requested the right to do
25 so prior to July?

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Felner

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A Prior to July 1st, that's correct.

4

Q Mr. Felner, the expenses that I

5

asked you questions about and to which you testified

6

on my initial cross-examination came from, I believe,

7

a schedule to which you were referring. Is that up-

8

dated as of today?

9

MR. CRAMES: Excuse me. Was that

10

the schedule which you gave him?

11

MR. ROSENBERG: No, sir, the sched-

12

ule which he used himself.

13

A Yes.

14

Q Is it your testimony that schedule

15

doesn't end with the expenses incurred as of July

16

10, 1976?

17

THE JUDGE: The schedulr or the

18

numbers that he gave?

19

MR. ROSENBERG: The numbers from

20

the schedule.

21

Q The numbers to which you have

22

testified?

23

THE JUDGE: That schedule has

24

not been introduced.

25

MR. ROSENBERG: That's correct,

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Felner

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3

your Honor.

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Q Will you answer the question, Mr.

5

Felner?

6

A

Will you repeat the question?

7

(The question was read.)

8

THE JUDGE: Mr. Rosenberg wants

9

to know whether the unpaid expenses about

10

which you have testified speak of today

11

or as of some earlier date such as July

12

10, 1976.

13

A

I believe they speak as of the date through

14

the 17th of July.

15

Q

Through the 17th of July but not as

16

of today, the 27th of July?

17

A

Correct.

18

MR. ROSENBERG: Thank you, Mr.

19

Felner.

20

REDIRECT EXAMINATION

21

BY MR. CRAMES:

22

Q

Regarding the account at Citibank,

23

you testified that a resolution was given to the bank

24

on or about July 5th or 6th --

25

A

Yes.

1 Felner

2

3 Q -- providing that no money was to be
4 transferred out of that account except with the order
5 of Mangel's. That was done via a resolution of the
6 board of directors of Fabric Tree?

7 A Yes.

8 Q Who comprised that board of directors?

9 A Mr. Echikson and myself.

10 Q This was done at the request of
11 Mangel's?

12 A Yes.

13 Q I assume that you wanted to rescind
14 that the board could convene and so resolve?

15 A Yes, it could.

16 THE JUDGE: Was that in any way
17 cleared with the Creditors Committee?

18 THE WITNESS: The resolution, no.

19 THE JUDGE: Was it discussed with
20 counsel?

21 THE WITNESS: Yes.

22 THE JUDGE: Was it reviewed by
23 counsel?

24 THE WITNESS: No.

25 THE JUDGE: When did you complete

Felner

the security agreement and any financing statements that were given to Mangel's pursuant to the original Court order which, I guess, was on or about May 10th?

THE WITNESS: When did we what?

THE JUDGE: Complete the paper work on that transaction.

THE WITNESS: When was the order entered?

THE JUDGE: Assume that the order was entered on or about the 7th of May, when was it that you completed the paper work with Mangel's on that transaction?

As I understand it, you gave them a security interest in your inventory, receivables, subs, lease and all kinds of things. Was that done at or about that time?

THE WITNESS: No, it was done over a period of time subsequent to May 10th.

THE JUDGE: The advances from Mangel's came over what period of time?

THE WITNESS: I believe the advances from Mangel's were -- if I could

Felner

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2
3 refer to notes.

4 THE JUDGE: Yes, you may refer to
5 anything that you want, unless the Mangel's
6 people have the information on the tips of
7 their fingers. I am talking only about
8 money.

9 MR. ROSENBERG: Approximately May
10 10th or so.

11 THE JUDGE: Up until when did that
12 continue?

13 MR. ROSENBERG: It is still con-
14 tinuing. You will recall at the last hear-
15 ing we agreed that we would finance for
16 another thirty days.

17 THE JUDGE: Has it been required?

18 MR. ROSENBERG: Well -- no, actu-
19 ally as of July 15th we have not. They have
20 been using more or less than their own
21 moneys.

22 THE JUDGE: That is when the last
23 cash advance was made?

24 MR. ROSENBERG: I don't have that
25 information with me.

Felner

THE JUDGE: Off the record.

(Discussion off the record.)

MR. CRAMES: Your Honor, I would like to have something clarified by the witness.

BY MR. CRAMES:

Q You had testified about Mangel's awareness with respect to the way that money was being received, deposited and checks drawn. You testified in response to counsel's question that there was no actual supervision by Mangel's and I would like to have you clarify the record as to how they became aware of how moneys were being handled; in other words, describe to the Court the process and how Mangel's would have been aware of it.

A I would have to characterize as discussions between Mr. Hoffman, the financial vice-president of Mangel's, and us.

There were discussions between Mangel's representatives and our controller and our accounting staff.

THE JUDGE: You were on the premises, you say?

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Felner

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THE WITNESS: Yes.

4

MR. CRAMES: I have nothing fur-

5

ther, your Honor.

6

RE CROSS-EXAMINATION

7

BY MR. ROSENBERG:

8

Q

As of what date were you on the

9

same premises?

10

A

We were on the same premises as of June

11

4th.

12

MR. CRAMES: Are you there today?

13

THE WITNESS: We are there today

14

and prior to June 4th representatives of

15

Mangel's had made numerous visits to our office

16

and had had discussions of this nature with us.

17

MR. CRAMES: I think this would

18

cover the testimony on the first question

19

that you raised and we have, of necessity,

20

overlapped some of the others, but what I

21

would propose to do for some balance is

22

to go back chronologically to the nego-

23

tiations which led up to the agreements

24

between the parties and --

25

THE JUDGE: With whom are you going

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Felner

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to do that?

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MR. CRAMES: Mr. Echikson.

5

THE JUDGE: Let's take a recess.

6

(Recess.)

7

R I C H A R D

E C H I K S O N ,

8

Called as a witness, having

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been first duly sworn by the

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Judge, was examined and testi-

11

fied as follows:

12

DIRECT EXAMINATION

13

BY MR. TREPPER:

14

Q

Please state your name and address.

15

A

Richard Echikson, 10 Ocean Court, Elberon,

16

New Jersey.

17

Q

What office do you hold with the

18

Fabric Tree?

19

A

I am the president of Fabric Tree.

20

Q

Can you tell us, in very brief form,

21

the function that you have performed for the company

22

and that you have performed?

23

THE JUDGE: We know each other.

24

Everyone in this room knows each other.

25

Let's get to the heart of the

1 Echikson

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3 matter.

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MR. TREPPER: The only reason that I am asking this question is because that much of what I will ask him about the pitch towards those functions.

THE JUDGE: Whatever he did, he did.

MR. TREPPER: I will withdraw the question and get to the point.

Q You are in charge of the marking and employee operation of the Fabric Tree?

A Yes, merchandising is the term that we use.

Q Did you participate in all aspects of the negotiations with Mangel's Stores Corporation at the time the agreement between Mangel's as the shareholder of Fabric Tree, and the Fabric Tree itself were entered into?

A Yes.

Q Weren't you present at basically all of these meetings?

A Yes.

Q Are you basically familiar with the agreement and with the purpose and intent of the acquisition by Mangel's by Fabric Tree?

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Schikson

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A Yes.

4

Q Would you tell us, please, first

5

of all, if you know what business Mangel's itself
is involved in?

6

7

A Well, Mangel's is, basically, in a moderate
price ready-to-wear operation in downtown and shopping
center stores in the southeast and southwest.

8

9

10

Q Did Mangel's, in its operation,

11

sell fabrics?

12

A No.

13

Q During the course of the discussion

14

with Mangel's, was it indicated to you that in acquiring
the Fabric Tree entity it was Mangel's intention

15

16

to convert fabric operation to an operation that would
more comport to Mangel's type of activity?

17

18

A Yes.

19

Q That would require consent of the land

20

lords which had stores in which Fabric Tree operated?

21

A Yes, it would.

22

Q Could you tell us whether it was

23

Mangel's intention to convert these stores to Mangel's

24

type operation as distinguished from Fabric Tree

25

operation prior to the confirmation of the arrangement?

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Echikson

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3

A

No.

4

Q

What was the understanding between

5

the parties?

6

A

Well, we, the Fabric Tree, primarily, Mr. Felner had an obligation to attempt to get the landlords to agree to permit this conversion with a time schedule which, I believe it was six months from the date of confirmation and sometime, then, we would be working on these conversions.

10

11

12

Q

During the period from the time

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19

A Of the fabric business, we would keep the fabric business operating and do our joint best to make it as profitable as possible.

20

21

22

Q

Do you have any estimate of how

23

24

long you expected that Fabric Tree would continue to operate as a fabric sales entity?

25

A

The date was -- it was indefinite, depending

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Echikson

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upon how Mangel's could get the consent and actually

4

convert some stores and through number evaluate the

5

performance of these stores and then make the basic

6

decision how many should be converted and how many

7

should be left as fabric units.

8

Q

It was the intention of the parties

9

to keep certain portions of the operation in the

10

future as fabric stores?

11

A

Yes, that was my understanding.

12

Q

At the time that the agreements

13

between Mangel's and the individual shareholders of

14

the Fabric Tree which, I believe, are Mr. Felner

15

and yourself pursuant to his testimony, were conducted,

16

negotiations were had, were they not, with regard to

17

what the stockholders, you and Mr. Felner, would

18

receive as a result of the Mangel's acquisition?

19

A

Yes, they were.

20

Q

Could you tell us briefly what

21

you and Mr. Felner were to receive as a result of

22

this acquisition?

23

A

Okay. We were to receive an employment con-

24

tract and we were to receive a payout, based upon

25

the performance of the stores, over a given period of

1

Echikson

2

3

time.

4

Q

Was that performance payout based not only upon a fabric operation but upon a possible later converted Mangel's type of operation?

5

6

7

A Yes, it definitely was. The plus side of it was the conversion.

8

9

Q

That is the conversion which you averted to which might be six months or more away?

10

11

A Yes, the timetable was indefinite.

12

Q

You referred to employment contracts which you and Mr. Felner would receive. Initially, what was your understanding with respect to the length of those contracts?

13

14

15

16

A Three-year contracts.

17

Q

This was with regard to the formula based upon your earn-out for the stock certain percentages employed; is that correct?

18

19

20

A Yes.

21

Q

And what was the percentage based upon, or percentages?

22

23

A The percentages were based upon the performance of the stores, how well they did.

24

25

Q

Was the computation based at all

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Echikson

on the inventory level of the stores?

A Yes, that was to be used at a starting point.
To get the profitability you had to ascertain annual
inventory levels, et cetera.

Q When you first began your discus-
sions with Mangel's which, I believe, was sometime
mid-April of this year; is that correct?

A Yes, sometime in April, yes.

Q Were discussions had between the
parties with regard to the value of the inventories
then in the various Fabric Tree locations?

A Yes, they were.

Q Do you recall approximately how
much the Fabric Tree, through its employees or offi-
cers, advised Mangel's that it was on the various
store premises at inventory valuation?

A Well, the valuation changed from time to
time that we were speaking at a given point as to
what it was in January, et cetera, but we were talk-
ing in the area of a certain inventory figure.

Q Do you remember what that area
was?

A I believe the area that we were talking

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Echikson

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about was in the \$400,000 area.

4

Q Prior to the execution of the various

5

agreements, did Mangel's conduct an investigation with

6

regard to the inventory levels in the stores?

7

A No.

8

Q Did Mangel's have any discussions

9

with persons at the Fabric Tree with regard to the value

10

of the inventories and did there come a time when

11

there was an understanding between the parties that

12

the inventories were somewhat less than originally

13

stated?

14

A Yes, very close to the actual signing of the

15

agreements when the Mangel's people had an opportunity

16

to come in and dig along with it it was estimated, be-

17

cause we were all going on estimates, that it was

18

very possible that the figure, whatever we thought

19

was, wasn't and, therefore, the formula would have

20

to be adjusted.

21

Q Was the figure less or more?

22

A Less.

23

Q Do you recall discussions with

24

Mangel's at that time with regard to what would be

25

required then of the Mangel's in order to make up

Echikson

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3 the difference in what had originally been represented
4 as to being there and what actually turned out to be
5 there?

6 A Yes, those discussions really stemmed from
7 putting out a volume plan and determining jointly what
8 the stock level should be at a given point. We agreed
9 upon a figure where the stock level should be on
10 August 1st, and we worked backwards from that figure.

11 At that time, assuming our stock was an
12 assumed lower figure, it would require those types
13 of dollars in the form of inventories to meet our
14 August volume plan.

15 Q So that Mangle's would be required
16 to invest more items in the forms of guarantee or
17 cash or whatever device had to be used to get goods
18 into the store other than what was originally antici-
19 pated; is that correct?

20 A Yes.

21 Q In order to accomplish that type
22 of arrangement, was there any action between, with
23 respect to the arrangement, with respect to the con-
24 sideration to be paid to you and Mr. Felner?

25 A We were asked to cut our employment contract

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from three years to one year, and to adjust the starting point of the formula, based upon an inventory that would be taken at a future date, and the difference between that inventory and what it was purported to be previous would be a penalty figure, if you will, against our earn-out formula.

6

7

8

9

Q

Did you subsequently agree to do

10

that?

11

A

Yes.

12

Q

Were agreements signed?

13

A

Yes.

14

Q

I show you a document denominated, "Purchase and sale agreement," dated May 4, 1976, between yourself, Mr. Felner and the Mangel's Store Corporation.

15

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19

Have you ever seen this before and does your signature appear on it?

20

A

Yes, I have seen it before, and my signature does appear on this.

21

22

Q

Are you familiar with Mr. Felner's

23

signature?

24

A

Yes.

25

Q

Is that his signature?

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A Yes.

Q Is this the purchase and sale agreement providing for the sale of your stock to Mangel's?

A Yes.

MR. TREPPER: I would like to have this marked, your Honor.

THE JUDGE: Does that include the amendment?

MR. TREPPER: This was the agreement. There is no amendment. He testified that there was an understanding which was modified.

(Purchase and sale agreement dated May 4, 1976, among Mr. Echikson, Mr. Felner and the Mangel's Store Corporation, marked Debtor's Exhibit 2 in evidence, as of this date.)

Q During the time that reviews were being had with Mangel's representatives concerning the inventory valuations, were certain pro forma balance sheets of Fabric Tree prepared with regard to future operations?

THE JUDGE: Excuse me. What is

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the point of all of this?

4

MR. TREPPER: I hope to get to

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the question of whether the July 15th was

6

ever important to anybody in this matter.

7

THE JUDGE: It would be better to

8

nail it down, since we are talking about

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time.

10

Q Pro forma balance sheets were

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prepared, were they not?

12

A Yes.

13

Q Through what period of time did they

14

run?

15

A We did a lot of various ones. The ones that

16

I was most familiar with and I was most involved with

17

was the volume and profit projection, and we had sev-

18

eral revisions, but, basically, sets one showing May,

19

June and July performance, the spring and summer

20

season, and the other showing August through January.

21

Q All as fabric?

22

A Yes.

23

Q When did those statements indicate

24

that the fabric operation could be expected to show

25

a profit?

1 Echikson

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3 A We would start showing a profit the week
4 beginning August 16th. That date was determined be-
5 cause it was the date of our big fall promotion.

6 Q Were those pro forma balance sheets
7 based upon the ability of Fabric Tree to obtain credit
8 on its own?

9 A No.

10 Q Were those to be placed upon the
11 guarantee of --

12 THE JUDGE: Excuse me. Are these
13 volume sheets?

14 THE WITNESS: That's correct, they
15 were not balance sheets.

16 Q During all of the negotiations and
17 discussions, was any discussion ever had, to the best
18 of your knowledge, regarding the purchase and sale
19 agreement or the go-forward aspect of the fabric
20 operation with regard to a business necessity to con-
21 firm the Chapter XI proceedings on or before July
22 15, 1976?

23 A No.

24 Q When, to your recollection, did
25 the first discussion with regard to a confirmation

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3 date of July 15, 1976 occur

4 A Sometime, obviously, prior to July 15th.

5 I would say sometime --

6 Q Perhaps I can better phrase the
7 question for you.8 Did the discussion occur at or
9 about the time that these agreements, Debtor's No.
10 2, which is the purchase and sale agreement, and
11 the loan security agreement, did those discussions
12 occur when these agreements had been signed?

13 A No -- yes, way after.

14 Q How long after do you recall the
15 discussion had with regard to July 15th date, and I
16 mean how long after the two agreements were signed?17 A Sometime in late June, early July, we
18 were told that this date was important and had not
19 been important until then.20 Q Do you recall the commitment which
21 was made and delivered to the Creditors Committee
22 representatives under a commitment letter which was
23 signed by Mangel's to deliver a \$600,000 certificate
24 of deposit?

25 A Yes, I do.

Q Do you recall when that letter

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1 Echikson

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3 was signed?

4 A I don't recall the exact date.

5 Q Was it at or about the time these
6 agreements were executed?

7 A Yes.

8 Q That commitment letter contains a
9 July 15th date?

10 A Yes.

11 Q You have heard that several times
12 in court today?

13 A Yes.

14 Q Do you recall the reason for the in-
15 clusion of the July 15th date in the commitment letter
16 delivered to the Committee?

17 A Yes, I do. The reason was to pin down the
18 Creditors Committee so as to give them a succinct time-
19 table to push for the acceptance.

20 Q Were there any discussions had with
21 Mangel's at that time with regard to it being an
22 absolute necessity from a business point of view to
23 being confirmed on or about July 15th?

24 A No.

25 Q Can you tell us, in your opinion,

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whether there would be any material or adverse effect
on this business from an operational point of view
as a fabric enterprise if confirmation occurred after
July 15, 1976?

7

A No, there would be none.

8

Q You previously testified that the

9

Fabric Tree, Inc. had prepared volume projections based
on certain inventory levels in the stores; is that cor-
rect?

11

12

A Yes.

13

Q Have those inventory levels in the

14

stores been kept consistent with those projections?

15

A Not recently.

16

Q Were initially orders placed which

17

would have kept these inventory levels consistent?

18

A Yes, we would have reached our agreed-upon
August 1st level. We would have come close to reach-
ing it. We made a joint decision to keep it some-
what under that to keep the merchandise in kitty, but
would have been on a merchandising kitty.

20

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THE JUDGE: You are talking about

24

open to buy?

25

THE WITNESS: Yes, sir.

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Echikson

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Q

The Fabric Tree was totally dependent upon Mangel's for the control of the supply of that merchandise, was it not?

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6

A

Yes. We had one vendor shipping us on credit, otherwise all of the orders were either guaranteed by Mangel's or shipped on a Mangel's order or whatever arrangements Mr. Hoffman was able to make with the credit community.

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Q

If the Chapter XI proceedings were confirmed today, next week, during the month of August, could the business have continued to operate, assuming that the inventory flows that have been projected had been kept constant?

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14

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16

A

Yes.

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19

Q

Could it have been operated profitably during your own projection when you expected the profit to occur?

20

21

22

Yes, in our May and June projection we anticipated making the July, August and September and the mid-August was the key one.

23

24

25

Q Did you have any discussions with suppliers or anyone else that led you to believe that Fabric Tree itself could have achieved mer-

1 Echikson

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3 chandise credit upon confirmation?

4 A No.

5 THE JUDGE: You asked him a two-
6 edged question. I don't know which ques-
7 tion he was answering.

8 Q Did you have any conversation?

9 A Yes.

10 Q What was the substance of those con-
11 versations?

12 A Well, to try to feel the waters, whether we
13 would get credit after confirmation.

14 The indications were that we, basically, would
15 not, and would still have to be dependent upon Mangel's
16 support in the credit community.

17 MR. TREPPER: I have no further
18 questions of this witness at this time, your
19 Honor.

20 Off the record.

21 (Discussion off the record.)

22 CROSS-EXAMINATION

23 BY MR. ROSENBERG:

24 MR. TREPPER: Your Honor, maybe
25 I can ask another question.

1 Echikson

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3 THE JUDGE: Sure.

4 BY MR. TREPPER:

5 Q Do you know whether vendors who had
6 been prepared to ship to Fabric Tree merchandise based
7 upon Mangel's assurance have since been informed to
8 withhold those shipments?

9 A Yes, by Mr. Hoffman and in certain cases by
10 me.

11 Q When you informed these parties
12 to withhold shipments, at whose direction were you
13 doing that?

14 A Mr. Hoffman and Mr. Lamm.

15 MR. TREPPER: I have no further
16 questions, your Honor.

17 CROSS-EXAMINATION

18 BY MR. ROSENBERG:

19 Q Sir, prior to the signing of the
20 agreements which are at issue right now, did you
21 have any substantial personal connection with
22 Mangel's?

23 A Personal, no.

24 Q During the time of the negotiations
25 of the agreements in question, were you privy to

1 Echikson

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3 Mangel's internal discussions as to what it did and
4 did not require from this agreement?

5 A I don't understand the question.

6 Q Were you present when Mr. Lamm,
7 the president of Mangel's, met with his counsel,
8 Cole & Deitz, and discussed the negotiations?

9 A Of course not.

10 Q You testified that you are the
11 man in charge of merchandising for Fabric Tree?

12 A Yes.

13 Q When does merchandise inventory
14 peak if it is to become profitable on August 15th?

15 A The obvious thing--

16 MR. TREPPER: Can we have the
17 definition of the word "peak"?

18 THE JUDGE: If we spoke of the
19 merchandising kitty, then we can use the
20 word "peak." We are talking about
21 p-e-a-k.

22 MR. ROSENBERG: Yes.

23 A The buyer would want to peak it well
24 in advance of that date and the controller would
25 want to peak it the day before, so you would want to

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Echikson

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peak your inventory on August 16th, but that is not the peak time of the year. You want the goods in on August 1st, approximately; in order to get the goods in on that date, August 1st, what date would the orders have to be written?

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A These orders would have been written -- we started writing orders shortly after confirmation and were still being written. We had a meeting with our area manager on July 5th.

THE JUDGE: You said shortly after

confirmation?

THE WITNESS: Excuse me. Shortly

after the agreements were signed.

Q In the normal course of business,

based upon your experience, what is the last date upon which you could normally write orders for the inventory to be in place on August 1st?

A With our notion supplier, three or four days before, and average fabric vendor, the minimum time would be ten days.

Q Could you tell us what dollar amount of inventory was to be received by Fabric Tree in the month of May? I believe your term would

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Echikson

be "open to buy"?

A I don't know it offhand.

THE JUDGE: That is a different term,
as I understand the language.

MR. ROSENBERG: I am sorry. Open
to receive.

A I don't know them offhand.

Q Can you tell me the amount that
was planned to be received in the month of May?

A No, I don't know that.

Q Does this refresh your recollec-
tion?

A Yes, this looks like a list of the goods
on order for May, June and July with some postpone-
ments.

Q Without identifying the schedule,
does it refresh your recollection so you can answer
the question?

A These are some of the goods. These are
not dated. I don't know when or where this was
prepared.

THE JUDGE: The question is does
that help refresh your recollection as to

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Echikson

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to anticipate counsel and not to out-guess him. It is only to answer the questions one at a time wherever they may lead.

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Q Can you tell me, either of your own

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memory or your memory as jogged, perhaps, by this

9

schedule, as to how much inventory was expected to

10

be received in the month of May?

11

A This figure here of 550 or 460 is what

12

the figures are. I don't know my May receipts off-

13

hand. I am sorry.

14

Q

Do you know who prepared that sched-

15

ule that you are looking at?

16

A No, I don't.

17

Q

Do you recall or have any recollec-

18

tion of the same figure for the month of June?

19

A No.

20

Q

How about the month of July?

21

A

No.

22

Q

Do you know or recall how much

23

Fabric Tree owed to Mr. Spilke?

24

A

It was broken down so many times and con-

25

fusing, I think the figure was in the area of three

1 Echikson

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3 how much goods you intended to receive
4 in May in dollars?

5 THE WITNESS: Yes.

6 Q What would that figure be, approxi-
7 mately?

8 A The first figure was 580 and it is crossed
9 out to 460.

10 Q We are asking for your recollection
11 based upon a refreshment from the papers and not what
12 it says.

13 A I am the head merchant and did not do the
14 buying. Let's get it straight. We have a very cap-
15 able young man who was the buyer who worked with the
16 Mangel's and they did it. Mr. Hoffman and I ap-
17 proved or disapproved it. We approved or disap-
18 proved payments. I did not go out in the market and
19 buy the goods and never wrote an order.

20 To answer your question is I don't know
21 what Mr. Rosenberg is driving at. If you are trying
22 to say that we bought goods from May, June, July,
23 August and September, you are right. If you are
24 trying to say --

25 THE JUDGE: Your function is not

1 Echikson

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3 hundred some-odd dollars, based upon the fact that we
4 made a 177 payment.

5 Q Does 321 sound right?

6 A That would be it.

7 Q Was Mangel's obligated to pay that
8 amount?

9 A Yes.

10 THE JUDGE: Not previously ob-
11 ligated to pay but by virtue of the agree-
12 ments; that's correct.

13 MR. ROSENBERG: No, sir, by virtue
14 of the agreements, your Honor.

15 I have no further questions of
16 this witness.

17 THE JUDGE: Did anybody want to mark
18 that agreement?

19 MR. TREPPER: That was marked,
20 your Honor, as Debtor's Exhibit No.2.

21 THE JUDGE: Does anybody want to
22 mark the Creditors' Committee, Mangel's
23 document?

24 MR. CAMES: It was not marked and
25 I think it should be marked as a joint

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Echikson

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exhibit.

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THE JUDGE: Mark one that has the signature on it. This has no signature of the Committee on it. If you have a copy of the credit that went with it, you ought to mark it as one exhibit so that the papers are together.

MR. CRAMES: We don't seem to have a signed copy of the commitment letter.

THE JUDGE: Is everyone satisfied that this document was signed?

MR. CRAMES: We are satisfied that it was signed.

(Commitment letter with attached credit marked Debtor's Exhibit 3 in evidence, as of this date.)

THE JUDGE: The form in which I have it bears no name nor any place for one.

MR. ROSENBERG: Then most likely it was not, your Honor.

THE JUDGE: There is a copy of it, then, with a typed letterhead of Mangel's Stores on the top and not on a

Echikson

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letterhead.

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MR. ROSENBERG: That's right, your

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Honor.

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THE JUDGE: Where was this prepared?

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MR. TREPPER: It was prepared in

7

my office.

8

THE JUDGE: That is the reason for

9

it not being on printed stationery.

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MR. TREPPER: Yes.

11

REDIRECT EXAMINATION

12

BY MR. TREPPER:

13

Q

Is there any doubt in your mind as

14

to the ability of the company to continue operations

15

in the future as a fabric operation, absent the with-

16

drawal by Mangel's the guarantee that it had previously

17

granted to vendors?

18

A You mean assuming that we get all of the

19

goods that were on order?

20

Q

Assuming that you got a continuous

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flow of goods, could the business have operated under

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those conditions as I have stated?

23

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Yes.

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Echikson

REXCROSS-EXAMINATION

BY MR. FABRIZIO:

Q Pursuant to the security agreement between the Fabric Tree and Mangel's, does Mangel's obtain a security interest on all of the assets of the debtor, Fabric Tree?

A As far as I know, it did.

MR. ROSENBERG: I object.

THE JUDGE: Sustained.

Q Has all of the stock of the debtor's subs been pledged to Mangel's?

A I am not an attorney. As far as I know, yes.

MR. ROSENBERG: Same objection.

MR. FABRIZIO: I am asking him if he knows whether or not the stock has been physically pledged.

THE JUDGE: You can ask him a lay question. The shares or the certificates representing the shares of the various subs of Fabric Tree, has possession of them been turned over to Mangel's or to someone on Mangel's behalf?

THE WITNESS: I believe so.

Echikson

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Q Of the thirty stores that are being operated by the debtor, are the leases for those stores all in the name of Fabric Tree?

A You are in a familiar area that I am not familiar with. I do know that they are not all, some are in the others. I never understood.

Q Some are held by the subs?

A I guess so, yes.

MR. FABRIZIO: I have no questions.

THE JUDGE: Do you have any other questions of this witness?

MR. ROSENBERG: No, sir.

THE JUDGE: You are excused.

MR. ROSENBERG: I would call Mr.

Nathan Hoffman to the stand, your Honor.

N A T H A N H O F F M A N ,

Called as a witness, having been first duly sworn by the Judge, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROSENBERG:

Q Please state your name and address.

Hoffman

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A Nathan Hoffman, 9 Carlton Court, East Brunswick, New Jersey.

Q Mr. Hoffman, are you employed by Mangel's Stores?

A Yes, I am.

Q What is your position there?

A Vice-president of finance.

Q For how long have you been so employed?

A Approximately two and a half years, three years.

Q Have you been involved or were you involved in the negotiations leading up to the signing of the agreements which are now in question before this Court?

A To some degree, yes. I attended some of the meetings, but not all of them.

Q Did you have discussions as to what generally took place and the general strategy even with respect to those matters when you were not personally present in a negotiation?

A Yes, I was.

MR. CRAMES: I have no objection

1 Hoffman

2

3 to the last question or the answer, but
4 just to short-cut this, if Mr. Hoffman
5 is going to be asked to testify with
6 respect to what would otherwise be hear-
7 say, then we will have a problem.

8 MR. ROSENBERG: He is not, your
9 Honor.

10 Q Mr. Hoffman, did you, in the course of
11 your participation in these negotiations, either
12 directly by your attendance at meetings with Fabric
13 Tree representatives or indirectly in the internal
14 discussions of Mangel's personnel or Mangel's and
15 its counsel, have any reason at any time to discuss
16 a cutoff date beyond which Mangel's would not be
17 obligated to finance a plan of arrangement?

18 THE JUDGE: Excuse me.

19 MR. CRAMES: I have an objection,
20 your Honor.

21 THE JUDGE: Proceed.

22 MR. CRAMES: I object to the form
23 of the question. I think we should get
24 factual first; persons, places, dates,
25 who was present and what was said.

1 Hoffman

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3 THE JUDGE: I assume that re-
4 quires a yes or no answer, and then he will
5 get specific.

6 I want to caution you, counsel, as
7 to the extent that you include attorneys
8 here, don't do something unwittingly that
9 you will be sorry for later on.

10 The hour is late and everyone is
11 tired. Once the door is opened, I will not
12 permit you to close it.

13 MR. ROSENBERG: I appreciate the
14 warning, your Honor.

15 Let me rephrase the question.

16 Q Did you, in any discussion either in
17 the negotiation with the debtor or in internal discus-
18 sion of those negotiations with Mangel's staff, ever
19 have occasion to discuss a cutoff date beyond which
20 Mangel's would not be obligated to finance an arrange-
21 ment?

22 A Yes, we had discussions prior to the signing
23 of the agreement, we did discuss.

24 Q With whom did you have such discus-
25 sion?

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Hoffman

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A I spoke to Mr. Harris who was formerly employed by the company who did most of the negotiation for Fabric Tree and with, I guess --

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THE JUDGE: Employed by which company?

7

8

THE WITNESS: Mangel's Store.

9

Q

He was the principal negotiator of the deal in question?

10

11

A

Yes.

12

Q

How did the question of a potential cutoff date arise in your discussion with Mr. Harris?

13

14

A We discussed cutoff and in relationship to our potential liability of Mangel's Stores in the event that there would be no confirmation and the claims exceeded X amount of moneys or whatever reason, that the confirmation plan would not go through; so we discussed the possibility of our total exposure of the Mangel Stores.

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Q

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The discussion, if I understand you, involved the total liability of Mangel's under its obligation to confirm an arrangement and its obligation to advance moneys for the purchase of inventory and perhaps other purposes; is that correct?

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Hoffman

A That's correct.

THE JUDGE: I would prefer a little less leading of this witness. If you get to something where we want to hear his recollection, I would like to hear the witness testify.

MR. ROSENBERG: I am sorry, your Honor.

Q What, in your own words, was the nature of the concern of yourself and Mr. Harris as to --

MR. TREPPER: Objection as to what was Mr. Harris' concern.

MR. ROSENBERG: I withdraw the "concern."

Q What was the nature of your concern in your discussion with Mr. Harris as to the potential liability and exposure to which you have just testified?

A We realized that during the month of May that we would have to buy merchandise for the Fabric Tree operation to get them into business. They were doing \$30,000 a week in sales and were losing about

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Hoffman

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\$60,000 a month at this rate. We felt that if we would infuse some inventory into the operation in the months of May and June, that we would be able to perk up the sales, you might say.

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We were concerned about the month of July

and its receipts. The month of July, just as in

Fabric, which based upon a plan submitted by Fabric

Tree, it may have been this gentleman, Mr. Cantor --

well, we realized that the month of July is usually

a very heavy receiving month for August and back-

to-school period. If there was no plan made during

that particular period -- actually, June 30th was the

date we were looking for. I don't know why we

stretched it to July 15th. I wanted the June 30th

date. We were talking about infusing about a

million dollars into the operation.

Q Can you break that down? What was

Mangel's commitment versus Mr. Spilke?

A We had on inventory a loan, \$322,000, for

Spilke for payment of inventory.

Q What was Mangel's exposure as to inventory purchases for the month of May?

A The month of May we planned, and I will be

Hoffman

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3 honest with you, I don't recall the exact date of
4 this letter, but I am pretty sure it was done after
5 the agreement. We felt that we would have to put in
6 the months of May and June with Spilke approximately
7 \$800,000, and we hoped not a million, but were think-
8 ing around \$800,000 which would have been May and
9 June purchases.

10 Q Did Mangel's have in mind at that
11 time a maximum figure beyond which it was not willing
12 to go?

13 A We had discussion. I don't know if Mangel's
14 had a maximum. This was just discussion. I cannot
15 answer that. I would assume that, based upon the
16 agreement -- all I know is that there was an agreement
17 that we will put up to a million dollars in loans to
18 Fabric Tree. That is all that I am familiar with.

19 THE JUDGE: Was that plus or minus
20 the \$600,000?

21 MR. ROSENBERG: Plus.

22 THE WITNESS: Excluding the \$600,000
23 that we put in.

24 Q You have testified that it was your
25 understanding that Mangel's was willing to put in a

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Hoffman

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million dollars and that was memorialized in the loan agreement, if there were a confirmation on August 1, 1976, rather than the July 15th deadline, based upon your knowledge, what would be Mangel's total output by way of loans?

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A Close to a million-five.

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Q Why is that?

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A Because of the heavy purchases in the month of July for back-to-school and to become profitable by August 16th. They would have to receive this merchandise mainly in the latter part of July and orders would have to be placed by July 15th or July 20th. They would have to be placed and we didn't want to go into a position in placing orders and guaranteeing merchandise that we would be responsible for if we didn't have a confirmation.

MR. ROSENBERG: I have no further questions at this time.

CROSS-EXAMINATION

BY MR. TREPPER:

Q

Mr. Hoffman, did I understand you to testify that if confirmation would have occurred on August 1st, Mangel's would have had to invest 1.5 mil-

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lion dollars rather than \$1,000,000 in inventories

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in order to make this business profitable?

5

A Yes.

6

Q

Does that apply to you that if Fabric

7

Tree were permitted to operate with that type of in-

8

ventory base the return on your investment would have

9

been realized and you would have been paid back?

10

A

I don't know.

11

Q

Do you have any reason to believe

12

that you would not be repaid if the stores were operated on

13

a profitable basis?

14

A

I thought I was going to be repaid sooner

15

some of the moneys laid out.

16

Q

How did you expect to get repaid?

17

A

From the moneys of the stores that they gen-

18

erated in sales during the month of June.

19

Q

There has been testimony in the

20

record from Mr. Felner, I believe, and perhaps from

21

Mr. Echikson that the company was receiving moneys

22

from its store level and was using those funds to

23

pay normal, current operating expenses, mainly

24

placing orders for merchandise.

25

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What do you consider current? Would you

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consider a bill six months old as being current?

Q I have not asked you a question yet.

There has been testimony to the effect that moneys were being received by the company and being used in the operation of the business; were you aware of that?

A That money was being used in the operation of the business?

Q Yes.

A No, I am not.

THE JUDGE: You don't understand or you were not aware?

THE WITNESS: I don't understand it.

THE JUDGE: As I understand the question is whether or not you were aware that the moneys being generated internally from the sale of goods by Fabric Tree were being used by Fabric Tree to pay its operating expenses.

THE WITNESS: Not all of it was being used for paying current.

THE JUDGE: Forgetting about whether

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Hoffman

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they were current or not.

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THE WITNESS: It was being used

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to pay operating expenses.

6

THE JUDGE: Bills of Fabric Tree

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that had arisen at least after the filing

8

of the Chapter?

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THE WITNESS: Yes.

10

Q

Do you know of any other form of

11

income other than the sale of inventory from which

12

you could be repaid?

13

A

They had rents from subtenants in a couple

14

of stores which amounted to two or three thousand

15

dollars a month, approximately.

16

Q

Was that rental income received?

17

A

Yes.

18

Q

Where was it deposited?

19

A

In one of the subs. I am not certain.

20

Q

Did you, in all of your reviews

21

of the Fabric Tree volume projections and balance

22

sheets and P and L statements, as they were, have

23

any idea as to when the company would begin to make

24

a profit?

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A

On the numbers that were given to us, I

Hoffman

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don't remember if it was right before or after the signing of the agreement. It was approximately in August, late August and September.

Q So that is it proper to infer from that answer that it would be reasonable to expect that the company would incur loss up to that time or at the very best break even?

A No, it was losses through and that was discussed with Mr. Felner and Echikson, those losses.

Q You stated that you expected to be repaid prior to August 15th?

A That's right.

Q Can you tell us, based upon the review of the numbers that you had and all the information that you had available to you, how you expected to get any money out of the business?

A Well, the loss that we expected to sustain the profits or cash that I was supposed to realize I thought I would be starting to realize some cash in the month of June -- let me try to refer to some of my notes for a minute.

Q Yes.

A It is a simple answer. I am sorry, since

Hoffman

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3 the company was not paying for any type of merchan-
4 dise, but the cash that we already put in, \$500,000
5 in cash. They were generating, let's say, forty or
6 fifty thousand dollars in sales. Their expense is
7 \$124,000 sales. These are their numbers; therefore,
8 there are \$60,000 that could be repaid for the pay-
9 ment of inventory.

10 Q Did you provide for that in your
11 agreement?

12 A Yes, I believe we had. I am not an attor-
13 ney, but all moneys were supposed to go to Mangel's
14 and all of that was repayable to Mangel's.

15 Q Are you now talking about the flow
16 of cash in and out of the business in that \$60,000
17 figure?

18 A That's right.

19 Q So that this number would not, in
20 essence, be in excess available in the bank account on
21 any given day?

22 A Of course it is. If you have \$200,000 in
23 cash and you only have to pay 124 in expense, we are
24 not talking about profit.

25 Q Assuming that state of facts, if

Hoffman

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3 you had made demand, and we are talking about a hypo-
4 thetical, for the \$60,000 and it had been paid over
5 to you and the Fabric Tree had to make a payroll
6 the following day or had to incur another expense
7 for rental the following day, where would the money
8 come from?

9 A In that amount of money it is payroll and
10 all expense they were not paying for inventory. If
11 you buy inventory and --

12 THE JUDGE: Is it your testimony
13 that during this period after May 10th
14 that Fabric Tree was not paying for any
15 inventory?

16 THE WITNESS: They did not pay for
17 inventory.

18 THE JUDGE: That the inventory came
19 in either shipped to Fabric Tree or billed
20 to Fabric Tree or shipped to Mangel's and
21 shipped to Fabric Tree?

22 THE WITNESS: It was shipped to
23 Fabric Tree.

24 THE JUDGE: Are you saying that
25 no inventory was being paid by Fabric Tree?

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THE WITNESS: They paid for approximately thirty-five or forty-five thousand dollars insurance May 3rd through approximately July 15th.

THE JUDGE: This money that Mangel's paid for inventory that went to Fabric Tree, is that considered part of Mangel's loan to Fabric Tree?

THE WITNESS: Yes.

THE JUDGE: In addition to that, you lent them cash?

THE WITNESS: Where a purchase order would not be accepted for merchandise, we would loan them \$15,000 to purchase the merchandise.

THE JUDGE: Then this is something that I don't understand, the only advances that Mangel's had made to Fabric Tree during the period of arrangement have been directly or indirectly for inventory?

THE WITNESS: That's correct.

THE JUDGE: You have not been giving them money from which they have paid

Hoffman

their operating expenses?

THE WITNESS: No.

THE JUDGE: Are you aware of how much the inventory purchases were supposed to be during the month of May?

THE WITNESS: I have inventory purchases for the month of May -- we ordered \$460,000.

THE JUDGE: This is a more significant number to Mangel's since you were financially responsible for it?

THE WITNESS: Yes.

THE JUDGE: What about June?

THE WITNESS: We were supposed to receive \$120,000.

THE JUDGE: July?

THE WITNESS: Approximately \$450,000.

THE JUDGE: And the month of August?

THE WITNESS: \$131,000 -- no, I am sorry. \$169,000.

THE JUDGE: Is the reason for May

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being so high the reason that was ascribed
to by Mr. Echikson?

THE WITNESS: The stores were
very bare and wanted to restock the stores.

THE JUDGE: To a certain extent, in
June you were then riding off of that crest?

THE WITNESS: Yes, but June is an
in-between month. You can't buy summer
and it is not fall. It is in July that you
get the fall order.

THE JUDGE: The July orders were
the beginning of the build-up of winter
inventory?

THE WITNESS: That's right.

THE JUDGE: Where do you get
your 1.5 million dollars?

THE WITNESS: We also gave Mr.
Spilke where he had to be paid, which
was the 321.

THE JUDGE: If you were to add
up May, June and July plus the 321, you
come to approximately a million-350?

THE WITNESS: Right.

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Hoffman

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MR. TREPPER: That is without

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August?

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THE JUDGE: That is as of August

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1st.

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Q

The numbers that you have just pro-

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vided to the Court, the 461 for May, the 128 for

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June, the 434 for July, the 321 for active corpora-

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tions, Mr. Spilke and the \$169,000 for August; at

11

what time were these numbers available to you, as

12

far as need of the Fabric Tree for inventory was con-

13

cerned?

14

A I don't recall.

15

Q

Was it before June 1st?

16

A It had to be very early in the negotiations.

17

I don't recall if it was -- I don't recall the ex-

18

act date. It might have been early May, for all I

19

know.

20

Q

So that all of these numbers were

21

available to you, as far as what the company would

22

need on a projected need, through August, in or

23

about May of this year?

24

A

Approximately, yes.

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Q Yet your testimony has been that

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the reason that Mangel's did not want to go forward was that it would require an investment of a million-five, which you seemingly just learned about?

THE JUDGE: I didn't interpret his testimony to be that.

Q Do you recall that to be your testimony?

A I have been in retailing -- maybe I will wait for the question.

THE JUDGE: That is always better.

Q Maybe I have had my recollection refreshed.

Was your testimony, and, again, I don't want to put words in your mouth, did you not state that Mangel's did not wish to go forward after July 15th because it would have required a total investment by Mangel's of a million-five?

A I said my total investment would be in excess of a million dollars. I don't remember the million-five.

Q You testified that in May you knew that you would be required, in order to get the stores to a profitable point, to put in at least a

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million-293 plus the 321 from Mr. Spilke.

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MR. ROSENBERG: I odn't believe

that states the witness' testimony. He
stated that Mangel's wanted to be in con-
trol prior to the time that the large in-
vestment was made.

THE JUDGE: That was not my under-
standing either.

MR. FABRIZIO: I never heard the
word "control."

THE JUDGE: I think that you and
Mr. Trepper have failed to see the light.

MR. CRAMES: Let me state what I
have heard --

THE JUDGE: Excuse me. Let me ask
him a couple of questions since I heard his
testimony.

You stated that your concern
about the dates and the financial exposure
of Mangel's was based upon what your ex-
posure would be if there was no confirma-
tion.

THE WITNESS: That's right.

Hoffman

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3 THE JUDGE: If there was a confirma-
4 tion on July 15th, you had no concern that
5 you would be obligated or would have com-
6 mitted a million and a half dollars by
7 August 1st, would you, or did you?

8 THE WITNESS: As of July 15th, I
9 was concerned if there was a confirmation
10 on July 15th, I would not concern myself,
11 as far as the total overall exposure of the
12 company at that time.

13 THE JUDGE: Your concern would be
14 what would your exposure in the event there
15 was no confirmation, and then you had to face
16 the music of trying to recoup your money?

17 THE WITNESS: That is number one.

18 The second part is that the opera-
19 tion was continuing to take a loss. The
20 longer you would wait, the longer the losses
21 would just continue, because if we kept
22 on putting in money, our exposure would have
23 been greater.

24 At what point do you turn around and
25 say, "I will keep on putting in," hoping if

Hoffman

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3 it does or doesn't. There may have been --
4 that is the part that I was concerned with
5 about the July 15th, I didn't want commit-
6 ments made of the company of Mangel's Stores
7 that, if I had my choice, I would want a
8 May 30th, if I could.

9 THE JUDGE: Actually, the big bulk
10 of the commitments that were made were for
11 July deliveries?

12 THE WITNESS: That's right.

13 THE JUDGE: Is that why, in the last
14 few days, you have been contacting suppliers
15 and advising them not to ship because you
16 didn't want to stand for the big bulk in pur-
17 chases?

18 THE WITNESS: That's right.

19 THE JUDGE: As a practical matter,
20 the testimony has been that there was no
21 anticipation of a break-even or turn-around
22 until mid-August at the earliest?

23 THE WITNESS: Yes.

24 THE JUDGE: Which meant that the
25 purchases for fall would have been made, the

Hoffman

commitments?

THE WITNESS: If we had the confirmation as of July 15th. If everything went through, we would have had the August 16th date. You are right as of the third part of August, we would have turned it to a profit.

THE JUDGE: I want to ask you this question openly. I understand your testimony to be that the concern of Mangel's in making commitments here and in setting a deadline is what would have been their exposure and their possible lack of adequate security if there was not ultimately confirmation?

THE WITNESS: Yes.

THE JUDGE: Do you have any further questions of this witness?

MR. TREPPER: Yes, your Honor.

BY MR. TREPPER:

Q I would like to again --

THE JUDGE: I want something clear here. I did not intend to cover the July 15th date. It was my understanding that

Hoffman

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3 was what his testimony was previously where
4 he spoke about the dates in terms of what
5 Mangel's concern was, if there was no
6 confirmation, and it seemed to me that
7 everyone was talking about something else
8 here. That is the only reason that I
9 brought it up.

10 Q Mr. Hoffman, in your own mind as
11 chief financial officer of Mangel's what, from a busi-
12 ness point of view, was the significance of a confirmed
13 plan on July 15th as opposed to August 1st?

14 A I can only tell you my concern and what I
15 have added to the conversations with Mr. Harris.

16 He may have other reasons and maybe Mr.
17 Lamm had other reasons for the July 15th date.

18 I was looking for the earliest possible
19 moment in time. It could have been June 30th, which
20 I would have preferred. They said it couldn't be
21 for one reason or another.

22 THE JUDGE: You wanted the least
23 amount of uncertainty?

24 THE WITNESS: Right. I am speaking
25 a bout what I contributed to the conversation

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with respect to the negotiations.

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THE JUDGE: Anything else, gentle-

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men?

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Q

What additional exposure, if any,

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has Mangel's entailed by virtue of a July 15th to

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July 27th delay with respect to the confirmation?

9

A Well, several things; one, we have had

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continuing losses. I would say that we had continuing

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loss of twenty to thirty thousand dollars, at leaset.

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In addition, the August 16th date is impos-

13

sible to reach. I would probably, whatever it is,

14

the continuing losses will continue through the month

15

of August. I did not project it beyond that point.

16

I know that the losses will continue.

17

Q

Is that based upon the unavail-

18

ability of merchandise?

19

A Partially, and many people have left

20

Fabric Tree, their main buyer, their assistant buyer

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left. I don't know if they have the staff to con-

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tinue.

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THE JUDGE: This has happened since

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July 15th?

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THE WITNESS: I think this was

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Hoffman

within two or three weeks ago. I cannot see a profit being made.

Q Assuming that the inventory was available to the stores in the amounts as ordered, could a profit have been generated?

A I really don't know. I don't know.

Q Do you remember having reviewed all of the volume projections that were delivered to you by Fabric Tree, have they met, exceeded or failed to meet the volume projections for the months of May, June and July?

A In certain times, they have exceeded it, they went below and at the present time they are going below their sales.

Q Substantially below?

A I don't recall.

THE JUDGE: When was the last time that you have reports for?

THE WITNESS: I got the sales report about a week about what they did for the prior week, which was \$40,000.

THE JUDGE: Do you agree with the testimony that was given here that they

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Hoffman

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met the projections substantially for May
or June?

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THE WITNESS: I don't know what
"substantially" is. What do you consider
to be substantial?

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THE JUDGE: I would consider no
less than five nor more than ten per cent.

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THE WITNESS: I think they hit
\$500,000 on \$200,000.

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THE JUDGE: I would consider a
miss by five per cent and possibly ten per cent
substantially meeting the projections.

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THE WITNESS: I would say in the
month of May they made the projections.

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THE JUDGE: What about the month
of June?

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THE WITNESS: I don't know that num-
ber offhand.

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THE JUDGE: I was asking because there
was specific testimony that they did not
meet them for May and June.

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THE WITNESS: I know May definitely
they made it. I don't know about June. I

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believe they made June as well.

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THE JUDGE: And July is a funny

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month?

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THE WITNESS: I don't believe they

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are making their projection at the present

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time.

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MR. TREPPER: That is all I have.

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REDIRECT EXAMINATION

11

BY MR. ROSENBERG:

12

Q

You testified, I believe, in response to counsel's question that you knew early in the negotiations or at least shortly after the agreements had been signed as to what the cash requirements would be. Is that correct?

16

17

A Yes, I didn't have a chance to complete my answer. I wanted to say that as a retailer we would know that the month of July is a heavy month for purchasing. If you are going to make any kind of agreement, you should know that you don't want to commit yourself for back-to-school which is normally ordered and some of it is delivered in the months of July and August. That was my concern.

23

24

25

Q

If I understand your testimony and

Hoffman

you may have been cut off on the point, I believe
4 that you were saying that the commitments of actual
5 dollar outlay wouldn't have been as great because
6 you would have expected to be repaid along the way
7 out of the cash flow generated, because Fabric Tree
8 was not paying for inventory except with funds pro-
9 vided by Mangel's?

10 A Yes, exactly.

11 Q For what purpose did Fabric Tree
12 use these funds which got Mangel's upset, if you
13 will?

14 THE JUDGE: Rephrase the question.

15 MR. ROSENBERG: All right.

16 Q I believe you testified that Fabric
17 Tree used this positive cash flow to pay non-current
18 operating expenses?

19 A That's correct.

20 Q Could you give me some examples
21 of what you are talking about?

22 A For example, they paid Peat, Marwick,
23 which is their accountants, all of the moneys owed
24 to them which was their accounting firm which did
25 an audit during the Chapter XI -- I don't have a

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breakdown of the bills. I know that, as far as the administration expenses, there is 9,000 awarded by the Court and there is no moneys owed them; in other words, there is \$9,000 that was paid out and no money was owed to them.

THE JUDGE: Peat, Marwick?

THE WITNESS: Yes.

THE JUDGE: Wasn't there something in their application that said they received \$1,500 or some amount? There was in two of the applications, I believe, something about having received partial payment already. I may be confusing the amounts.

MR. CRAMES: In their original retention order were authorized to be paid on the rendition of monthly bill- and some were not paid and some accrued and remained unpaid.

Those that remained unpaid were cleaned up by Fabric Tree. Their application for allowance had been prepared before the final payment had been made so there was a variance, but they have been paid all

Hoffman

that they are entitled to be paid pursuant to the order of retention.

When we credit it against what you have allowed, there is a zero balance remaining. That is all that it means.

Q Given that, Mr. Hoffman, based upon what the projections that you were given at the time that the deal was made and further based upon your understanding of what would and would not be paid out of what we have labeled deposit cash flow, what would Mangel's total commitment have been had there been a confirmation on July 15th?

MR. CRAMES: I object to that, your Honor. I don't know that it is at all relevant what Mr. Hoffman's understanding might have been.

Once we establish that administration expenses, regardless of when they were incurred, were, indeed, administration expenses. There is no prohibition that I know of as to it being paid.

THE JUDGE: Why don't you ask him if he can testify as to how much of

Hoffman

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2 the moneys generated by Fabric Tree after
3 May were applied to this kind of an item?

4 MR. ROSENBERG: I will accept
5 your question as my own.

6 THE WITNESS: After the month of
7 May.

8 THE JUDGE: The beginning of your
9 support of the operation?

10 THE WITNESS: In the month of May
11 there was \$200,000 in sales generated in
12 May.

13 The expense for that month was given
14 to us by Fabric Treewas \$124,000. It leaves
15 a difference of \$75,000.

16 I would assume \$20,000 of that
17 was paid for rents above and beyond the
18 normal \$43,000 that they paid each month.

19 They paid \$63,000 in rent and some ad
20 tional amounts which put them in the same cas
21 position in the end of May as in the be-
22 ginning of May, perhaps \$10,000 in excess.

23 I cannot account for \$75,000 which
24 should have come back into the company.

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Q

Were there any additional amounts that cannot be accounted for for the months of June and July?

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A To my recollection, I found that several stores had closed in the month of February where we paid rent for which I didn't think was a current operating expense, a store closed in the month of February, but I didn't think it was vital to be paid at this particular point.

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THE JUDGE: Do you think that any

of those were paid in error?

THE WITNESS: No, I know that as a fact

THE JUDGE: Did you prepare any kind of a schedule of those items?

THE WITNESS: Yes.

THE JUDGE: From what did you prepare it?

THE WITNESS: The -- well, for the month of May I don't have detailed -- well, this is -- I don't know if I should go into this as to how we came across this. There was a listing given to me by Mr. Felner in which he said he would like to pay

Hoffman

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3 some post-Chapter XI expenses which were not
4 current operating expenses, in which I asked
5 him not to pay it.

6 At that time I was getting some in-
7 formation from Fabric Tree, as far as what
8 their payments were. We asked them around
9 the end of June to give us a list of all of
10 the payments made by Fabric Tree to all of
11 the various accounts which Mr. Felner felt
12 he was not legally bound to give us.

13 He gave us a list of post-Chapter
14 XI expenses that were not current, and I
15 asked him not to pay for it unless I get
16 a complete breakdown and unless it was
17 Federal tax I would not want to pay any-
18 thing that was not necessary to pay.

19 He felt that it was necessary to
20 pay it in order to reduce the administration
21 claims of Fabric Tree, in order to reduce
22 it to the \$150,000 level.

23 This took place around June 27th
24 or June 28th.

25 THE JUDGE: What did you say to him?

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Hoffman

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THE WITNESS: I told him not to pay it. A week after I discovered on the cash report which I put into operation on June 23rd, I discovered that some of these items were paid. As a matter of fact, I have it here.

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Q With respect to your testimony,

did you request Mr. Felner to stop payment on any of those checks?

A Yes, I and Mr. Lamm asked him to stop payment on the Peat, Marwick check, and there was another check -- I don't recall. We asked him to put a stop on the Peat, Marwick check, and I believe there were two other checks involved.

Q What was his response?

A He would not.

Q Did he give you a reason?

A He didn't think that was a proper management decision to stop payment on a check.

MR. ROSENBERG: I have no further questions.

THE JUDGE: Anything else of this witness?

1

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REXCROSS-EXAMINATION

4

BY MR. CRAMES:

5

Q Do you have any reason to question

6

whether any of the payments which were made were,

7

indeed, post-Chapter XI obligations and were proper

8

as to amount?

9

A I would say in my analysis I find nothing
wrong with the amounts paid and they were, to my knowledge
all post-Chapter, whatever I found was all post and
nothing pre-Chapter XI.

10

11

12

13

Q Are you aware, Mr. Hoffman, of the

14

genesis of the \$150,000 figure used in the commit-

15

ment letter for priorities and administration expenses?

16

A I did not get involved in the total \$600,000.

17

I was not involved in that part of the discussion.

18

Q Are you aware of how that number

19

was arrived at and why it was used as the amount of

20

the ceiling on the priorities and administration ex-

21

penses?

22

A How they got the number, I don't know.

23

Q Would it refresh your recollection

24

at all if I told you that \$150,000 was arrived at by

25

adding together the pre-Chapter XI priority claims

1 Hoffman

2

3 which were estimated at about \$42,000, estimated fees
4 and allowances of a hundred thousand dollars and
5 approximately \$8,000 for court costs; would that re-
6 fresh your recollection?

7 A As a matter of fact, that is the first time
8 I am hearing of that.

9 MR. CRAMES: I have nothing fur-
10 ther.

11 MR. ROSENBERG: Nothing further.

12 J O S E P H H . L A M M ,

13 Called as a witness, having
14 been first duly sworn by the
15 Judge, was examined and testi-
16 fied as follows:

17 DIRECT EXAMINATION

18 BY MR. ROSENBERG:

19 Q Please state your name and address.

20 A Joseph H. Lamm, 12 Venado Drive, Tiburow,
21 California.

22 Q What is your employment situation?

23 A I am the president of Mangel's Stores.

24 MR. TREPPER: We will concede
25 that.

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Lamm

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3

Q For how long have you held that

4

position?

5

A Two and a half years.

6

Q Have you been involved in the nego-

7

tiations currently the subject of this dispute from
the very beginning?

9

A Yes, I was in on all of the initial dis-

10

cussions. I then decided to take a vacation when

11

the continuing negotiation was carried on by Mr.

12

Harris and I got back into it when I returned.

13

Q What was the date of your return?

14

A May 6th or 7th.

15

Q You were involved continually from

16

May 6th until today?

17

A Yes, sir.

18

Q Did you, in the period from May

19

6th to the present date, attend any meetings with

20

the debtor and the debtor's counsel in connection

21

with this agreement?

22

A Yes.

23

Q May I ask if you can recall if you

24

attended such a meeting on June 25, 1976?

25

A No, I did, however, attend a meeting on

1

Lamm

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3

June 24th.

4

Q Where did this take place?

5

A At the office of Levin & Weintraub.

6

Q Who are Levin & Weintraub?

7

MR. CRAMES: I will concede who

8

Levin & Weintraub is.

9

THE JUDGE: That is a mystery for

10

at least forty years, I understand.

11

Q In the course of the meeting on

12

June 24th at Levin & Weintraub, was the question

13

raised as to whether or not Fabric Tree would be in a

14

position to confirm its arrangement on July 15th or

15

before that date with a \$600,000 or less deposit?

16

A Yes, that question was raised.

17

Q Who was involved in the discussion

18

of that question?

19

A Mr. Crames, Mr. Felner, Mr. Schroeder

20

and I were in the office.

21

Q What did you say to Mr. Felner or

22

Mr. Crames with respect to that question?

23

A I stated that without any equivocation,

24

unless they bring it down to \$600,000 by July 15th,

25

we will not permit the confirmation to go through.

1

Lamm

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3

Q

What did Mr. Crammes and Mr. Felner

4

respond?

5

A

Mr. Crammes responded, "Oh, you are not going

6

to let some small amount stand in the way."

7

Perhaps that is not exactly what he said,

8

but perhaps I am permitted to paraphrase.

9

Q

Were you present at another such

10

meeting on June 29, 1976 in the course of the series

11

of meetings?

12

A

Yes, sir.

13

Q

Who was present at that meeting?

14

A

My recollection is that, again, Mr. Crammes,

15

I believe you were there; I am not too sure of

16

Mr. Felner or Mr. Trepper, but I know that it was

17

Mr. Crammes, you and I.

18

Q

Was the question again raised as to

19

the ability of Fabric Tree to confirm on or before

20

the 15th of July with a \$600,000 or less deposit?

21

A

Yes.

22

Q

What did you say to Mr. Crammes?

23

A

I repeated my prior position.

24

Q

What did Mr. Crammes say to you?

25

A

"Don't worry about it. We will work it

out."

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MR. ROSENBERG: I have no further questions.

CROSS-EXAMINATION

BY MR. CRAMES:

Q Mr. Lamm, during the course of these meetings that you had at our office with your counsel, did we discuss the then state of the claims as to how much the priorities were and how much the general claims were and how much the administration claims were?

A To some degree we did.

Q In the course of that discussion, was it explained that there were large areas of discrepancy and dispute and a downward adjustment across-the-board would undoubtedly be made?

A Yes.

Q Would it be fair to state that your comments to us as to Mangel's position were to the effect that you would not be pleased with any figure in excess of \$600,000?

A I don't recall the exact statement, but I do know that I was quite assertive in my statement that we will not go through with the confirmation if we

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Lamm

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3 have to put up as much as \$600,000 and one penny.

4

That is what I remember saying exactly.

5

Q You have heard the testimony today,

6

have you not, of Mr. Felner and Mr. Echikson and

7

Mr. Hoffman?

8

A Yes.

9

Q You have heard Mr. Hoffman testify

10

as to his concern from a financial point of view if

11

confirmation did not take place by the 15th of July.

12

Now, from your point of view, as

13

being the chief executive officer of Mangel's, in

14

view of the substantial investment that Mangel's had

15

already made -- has already made by dint of the

16

cash advances and the inventories shipped on Mangel's

17

credit or guarantee, and by the way, how much is

18

Mangel's owed today, approximately?

19

A Approximately \$700,000.

20

Q That has nothing to do with the

21

\$600,000 credit that is with the chairman of the

22

Committee?

23

A That's correct.

24

THE JUDGE: That is exclusive or

25

inclusive of the Spilke money?

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Lamm

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MR. CRAMES: Inclusive, I believe.

4

Q

5

In view of that substantial commitment that Mangel's has already made, did you not indicate to us that it was really business decision as opposed to a legal decision as to whether or not Mangel's would go forward should the cost of the confirmation should exceed the \$600,000?

6

7

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A

It was both business and legal.

11

Q

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Didn't I ask you whether, if the question boiled down to the question of dollars and cents, and if the confirmation could be achieved for the \$600,000 figure, would Mangel's agree to go forward, and did you not indicate the affirmative?

A I stated emphatically that if you came in with the \$600,000 by July.

Q What is the magic about that date?

A There is nothing magical. We originally tried to get a date of June 30th by virtue of the fact, as Mr. Hoffman had pointed out, the big push comes in the month of July, and if you don't get your inventory in July, you can blow, if you may use that word, the entire fall season.

First of all, your customers become aware

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of the lack of merchandise in your store, and it is doubly difficult to get them back; so that our initial thought was that if we could get this thing confirmed by June 30th, we would know what direction we were going in and, on the other hand, we could hold back an investment that could be unrecoverable.

Q

Under the agreement for the purchase and sale of the Fabric Tree stock, is there not provision to the effect that the consents of the landlords to conversion of stores from Fabric Tree stores to Mangel's Stores was to take place over a period of several months and, presumably --

MR. ROSENBERG: This goes well beyond the scope of the direct examination, and the agreement speaks for itself.

MR. CRAMES: If I may respond to the objection, your Honor, the first prong of it I am leading up to something which I think is very material and it really goes to the heart what this bargain was.

As to the second prong, I think the cross-examination has already gone

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beyond the scope of direct, and Mr.
Rosenberg has waived any right he had to
object.

THE JUDGE: I don't know whether that
will prevail if this is a new subject.

MR. ROSENBERG: This is a new subject,
and I object now.

THE JUDGE: Try a rephrased question
which, at least, will not run afoul of the
first objection.

MR. CRAMES: Fine, your Honor.

Q Mr. Lamm --

THE JUDGE: This is a subejct that
has been touched upon today.

MR. CRAMES: It has, your Honor.

THE JUDGE: I don't think there
is any dispute, at least, as I understand
the testimony, that, to the extent there
were to be changeovers in the stores from
a Fabric Tree to a Mangel's mode, that it
would not be possible to accomplish that
until the latter part of the year at the
earliest. There is uncontroverted testi-

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mony to that effect, as I recall, either
Mr. Felner or Mr. Echikson had testified
to.

4

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MR. CRAMES: That was predecessor

7

to my next question.

8

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Q If the confirmation had taken place
prior to July 15th and the consent of the landlords
were never obtained, what would have been the posi-
tion of Mangel's?

A With respect to the --

13

MR. ROSENBERG: Objection.

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THE JUDGE: I will deny that on
the ground that you qualified the witness
at the outset by indicating that after
his return on May 6th or 7th he then par-
ticipated throughout and was the chairman
of the board and was responsible for the
directing of the negotiations.

THE WITNESS: Thank you for the
promotion.

THE JUDGE: You are not the
chairman?

THE WITNESS: No. We certainly

1 Lamm

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would have gone ahead because the entire

4

thrust of this thing we continue a

5

fabric operation, even if we couldn't con-

6

vert one store. Of course, I made every

7

effort to get the landlords to go along

8

because we had waited until after the con-

9

firmation and had a short period of time on

10

the lease to run out, it would be much

11

more difficult to get the landlords to

12

give us the right to convert to apparel

13

stores, and there was no particular plan

14

that I couldn't challenge any of the testi-

15

mony, but I heard something said that we

16

had planned to convert them within six

17

months.

18

There was no such plan.

19

As I recall, Mr. Harris had selected

20

four stores which we would attempt to convert

21

within a reasonable time and after that it

22

would be as business continues.

23

If a store operating a fabric busi-

24

ness could not produce as much as we thought

25

an apparel shop would, certainly we would

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make the conversion.

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8

Q Is not a fact, Mr. Lamm, that the prime factor which induced Mangel's to consider this deal in the first place was the locations which the debtor had?

9

10

11

A Certainly.

12

13

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25

Q And the locations Mangel's considered to be good locations, did it not?

A Yes.

Q And the leases were looked at, were they not, by you or your real estate people?

A I reviewed copies of a substantial number of leases that were submitted to me.

Q What assets, and not in terms of specific dollars and cents, but in terms of what type of assets other than the leases for the moment, did Fabric Tree have when Mangel's first came into this situation?

A The initial presentation was that they had the lease and \$500,000 of inventory and stores that had leasehold improvements.

I don't recall those values, but certainly to open up a shop does take some money.

MR. ROSENBERG: Your Honor, I am

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not objecting to these questions because
I assume you would overrule them on the
same ground as you have overruled the
others; however, I would like to state
my objection.

7

8

Q Mangel's was not particularly inter-

9

ested in this deal because of the inventory Fabric
Tree had in the stores?

10

11

A Of course we were. If we are going to run
a fabric business, we wouldn't run it without inven-
tory.

13

14

Q What I am suggesting to you, and
perhaps I should pre-phrase the question whether
the principal inducement to Mangel's was, indeed, the
locations and the leases that Fabric Tree and its
subs had on those locations.

15

16

17

18

19

A Plus one major factor, the potential profit
of these operations.

20

21

Q To achieve potential profit required
a substantial injection of cash and merchandise?

22

23

A Yes, it did.

24

25

Q The order that was signed contem-
plated up to as much as a million dollars of that,

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Lamm

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3 did it not?

4 A Yes, sir.

5 Q Has there been any change in the
6 leases or the lease arrangements between July 15th
7 and today, to your knowledge? Are the leases today
8 what they were on July 15th?

9 A For the most part, yes.

10 Q Are the fixed assets what they were
11 on July 15th?

12 A I would assume so.

13 Q Have the inventory levels materially
14 changed?

15 A The inventory that is presently in the
16 stores represents, as I understand it, for the most part,
17 summer merchandise, and the small volume of inventory
18 that is available for fall is limited.

19 Q Since July 15th has there been any
20 significant change, to your knowledge, in the inven-
21 tory in the stores?

22 A No, but --

23 Q Could you hold your answer to my
24 questions? I am sure that anything that I don't
25 ask you Mr. Rosenberg will ask you on redirect.

Mangel's has taken certain steps,

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1 Lamm

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3 according to Mr. Hoffman, to stop shipment of goods
4 that would otherwise be made; have they not?

5 A Yes.

6 Q Can you tell us whether any instruc-
7 tions were given by Mangel's to vendors prior to July
8 15th not to ship on orders previously given?

9 A I did not make any telephone calls and I
10 believe that Mr. Hoffman did.

11 THE JUDGE: That question was
12 addressed to pre-July 15th.

13 Q Mr. Hoffman did cancel orders prior
14 to July 15th?

15 A I believe he can speak for himself.

16 Q Do you know whether he did?

17 A I don't know.

18 Q Were you involved in any discussions
19 with him or anyone else at Mangel's or at Fabric Tree
20 regarding the cancellation of orders for merchandise?

21 A I have no clear recollection about can-
22 celling. I do have a clear recollection of stating
23 that we will withdraw our guarantee as against any
24 future orders.

25 Q When was that determination made?

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Lamm

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A I would assume that was sometime around July
6th or 7th.

4

5

Q That determination was made by you and
Mr. Hoffman and others at Mangel's?

6

7

A Primarily by me.

8

Q Was it implemented?

9

A I would assume that it was.

10

Q Who implemented it?

11

A Mr. Hoffman together with Mr. Echikson and
Mr. Felner-- forgive me, Mr. Felner -- no, he was
there. We talked about that. This is somewhere
in the week of July 6th.

14

15

16

17

I would like to refer to something that
brought this about, even though a question has not
been asked.

18

19

THE JUDGE: I don't think that
counsel has any objection.

20

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A What led up to all of this was the fact
that we could not get any information from Mr. Felner.
We tried to determine where we stood because the
confirmation was coming forward and every time we
inquired about statistics, the controller was not
there or he would be there and get it for us to-

Lamm

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3 morrow, and I finally said, "Let's find out where
4 we stand because we are getting to the point where,
5 in the event that we are not confirmed, we are
6 liable to find ourselves obligated to pay down a
7 great deal more than we should like to. Not only
8 will we be liable, but in liquidation would bring
9 back less than half of what we had invested."

10 I tried to bring this to a head. That was
11 the primary reason for the meeting with Mr. Crammes.

12 Subsequent thereto, upon my return to the
13 office, I inquired about where all the moneys were. In
14 pursuing the matter, I found out that we had not
15 taken down any money from the receipts that they had
16 generated.

17 The next thing I knew was that there was
18 no money after having been told that there was
19 \$80,000 in the till.

20 Q Mr. Lamm, in the meetings that
21 were held in our office, did you ever apprise us
22 of a decision made or about to be made to cancel
23 guarantees given to vendors or stop orders to ship?

24 A I have no recollection. I remember that
25 we had a discussion about that, but I don't recall

1 Lamm

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3 saying to you that we were going to cancel our guaran-
4 tees.

5

6 Q Did Mangel's board of directors
7 meet to discuss this Fabric Tree situation?

8

9 A No, sir.

10

11 Q Was there any board of directors
12 meeting in the two weeks prior to July 15th?

13

14 A No, sir.

15

16 Q By whom was the decision made not
17 to proceed, if this cost any more than \$600,000?

18

19 Was this made by you?

20

21 A What \$600,000?

22

23 Q For the confirmation of the plan.

24

25 A That was my decision.

26

27 Q Can you tell us when you made that
28 decision?

29

30 A I made that decision in your office.

31

32 Q That is at the June meeting that
33 you were talking about?

34

35 A Yes, the June 24th meeting because I didn't
36 know whether it would be \$600,000 or \$800,000.

37

38 At that time I stated to you that you have an obliga-
39 tion to bring those claims down. I don't want to wait
40 until July 15th and would like to have it done earlier.

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Your retort was, as I recall it, "It will not be a material amount anyway."

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Q At the meeting, in fact, I believe at the second meeting in our office, do you recall discussion about the administration claims figure and how the \$150,000 figure was arrived at in the first place?

A I don't recall the discussion in your office.

Q Do you recall the general discussion of the \$150,000 figure or was this something that was discussed with Mr. Harris?

A No, I was involved with the discussion of a figure of \$125,000.

Q Which then became \$150,000?

A Yes.

Q And --

A To which I agreed.

Q And the component parts of it were, as I have stated it in my question to Mr. Hoffman?

A Can you restate it?

THE JUDGE: 42, 8 and a hundred.

THE WITNESS: There was, as I recall, administration expenses included

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Lamm

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3

therein.

4

THE JUDGE: I think what counsel

5

asked Mr. Hoffman was that pre-filing

6

priority claims were \$42,000, a hundred

7

thousand dollars for professional fees

8

and the rest for court costs.

9

Q That is my question to you, is whether

10

these three component parts result in the 150 figure.

11

A All I know is that it was 125 for allowance

12

for pre-Chapter XI expenses, and my recollection was

13

for any other administration expenses in which the

14

company was involved.

15

Q When Mangel's came into this situa-

16

tion in the early part of May of '76, was there any

17

discussion with you or with anyone else representing

18

Mangel's as to any open and unpaid bills of the

19

D.I.P.?

20

A I don't recall any.

21

Q Would this have been something that

22

you would have been involved in?

23

A I would have been involved in it.

24

Q You don't recall any discussion

25

or it was never brought to your attention that there

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Lamm

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were or might be unpaid bills of the D.I.P. for rent,

4

tax, for God knows what?

5

A They were all deposited in a word called

6

"administration expenses."

7

Q

You will recall in our office, either you or Mr. Hoffman brought up the subject of some "seventy-odd thousand dollars" of unpaid administration expenses, some of which he referred to today; do you recall that discussion?

11

12

A No, I don't.

13

Q

Was it ever your thinking, Mr. Lamm, that the \$150,000 was intended to include items other than pre-Chapter XI priority claims, court costs and fees?

14

15

16

17

A That was my understanding.

18

Q

That it would include just those items or others as well?

19

20

A Just those items.

21

MR. ROSENBERG: Read back the ques-

22

tion and answer.

23

(The record was read.)

24

A It was to include pre-Chapter XI claims, allowances and any administration claims up to the time that we came into the picture.

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Q Did anyone from Mangel's, either
a Mangel's employee or --

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6

THE JUDGE: Will you read back
the last answer?

7

(The answer was read.)

8

9

Q You say up to the time that you
came into the picture --

10

A Which, I believe, was May 7th.

11

12

Q -- on May 7th. The commitment
letter speaks in terms of unpaid expenses of administra-
tion as at the time of confirmation, does it not?

13

14

A I have to look at the agreement.

15

16

THE JUDGE: That is a characteriza-
tion of what it says.

17

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22

Q You have heard the testimony to-
day on the payment of expenses of administration and
administration claims, and Mr. Hoffman did concede
that there were no payments made for claims that
were not proper administration claims and which were
not proper as to amount.

23

24

You have heard that, have you not?

25

A I did.

Q

Is it your testimony that the D.I.P.

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Lamm

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3 was not permitted to pay bona fide administration

4 claims arising during the course of its business?

5 A That is exactly what we told Mr. Felner.

6 We were obligating ourselves to pay current obliga-

7 tions, ongoing obligations.

8

Q I know that you are not an attor-

9 ney, Mr. Lamm, but you do have some experience with

10 Chapter XI proceedings and, if I were to ask you

11 whether it is not customary for debtors in possession

12 to pay their Chapter XI obligations, what would your

13 answer be?

14

MR. ROSENBERG: I object. He is

15

in short contact with Chapter XI and

16

that hardly qualifies him as an expert.

17

THE JUDGE: You might ask him the

18

question in a different way.

19

MR. CRAMES: I will withdraw the

20

question.

21

THE JUDGE: Mr. Lamm, at one point

22

here, if not today, then on July 15th, it

23

was asserted by your counsel that what was

24

originally contemplated was that all funds

25

collected by Fabric Tree from sales in the

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regular course of business would be paid
to Mangel's?

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5

THE WITNESS: Yes, sir.

6

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THE JUDGE: If that were done,
Fabric Tree would have no money with
which to pay anything.

8

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THE WITNESS: Yes.

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THE JUDGE: Principally, administration
expenses.

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THE JUDGE: Is it your position,
then, that to the extent that there are
unpaid administration expenses today re-
sulting from post-May 7th operations, they

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are not included in the \$150,000?

4

THE WITNESS: I would say, yes.

5

6

THE JUDGE: Yes, they are not included?

7

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THE WITNESS: Yes, they are not included.

9

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11

THE JUDGE: Your concern was the financial concern of the debtor as a D.I.P. at the time that you got involved?

12

THE WITNESS: Yes.

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THE JUDGE: Was there any effort made to ascertain as of that time what the D.I.P. situation was in terms of either accrued or incurred administration expenses that were unpaid?

THE WITNESS: My recollection is that we asked for schedules. Unfortunately, I left and I assumed that these were looked into.

THE JUDGE: When was this case filed?

MR. TREPPER: August 6, 1975.

THE JUDGE: By the end of April

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Lamm

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4

the Chapter proceeding here had been going
on for about nine months?

5

THE WITNESS: Yes.

6

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9

THE JUDGE: You don't recall
whether or not you did receive and review
the question of pre-May unpaid administra-
tion expenses?

10

THE WITNESS: I did not review.

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Q Is there any restriction, to your
knowledge, as to what administration expenses Fabric
Tree can and cannot pay?

A Perhaps I ought to put this in a different
context. In assuming the obligations that we did
if, in fact we did, the Fabric Tree was not confirmed,
then it was my feeling that we should not be obligated
to pay any debts that they had incurred prior to our
coming into the picture, because, bearing in mind

Lamm

1
2
3 that we were putting up substantial sums of money and,
4 in the event of no confirmation, we would then have
5 to try to get our moneys paid out of the available
6 funds if, in fact, those funds were used to pay prior
7 debt that would reduce the chance of our getting all
8 the money that we are entitled to.

9 Q Let me restate the question.
10 Your answer doesn't quite respond to the question.

11 Is there anything in any of the
12 documentation that was signed between the parties re-
13 stricting in any way what expenses of administration
14 Fabric Tree can and cannot pay?

15 MR. ROSENBERG: Objection. The
16 documents speak for themselves.

17 THE JUDGE: If counsel wants to
18 object, I will sustain the objection.

19 MR. FABRIZIO: Will counsel point
20 out to us where the agreement, the document
21 speaks for itself?

22 THE JUDGE: If it doesn't say
23 anything, then it is not in there.

24 The question is whether something
25 was in was not in the documents. He is

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Lamm

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3

requiring that somebody read the documents
and see whether it is there or not.

4

5

Q Mr. Lamm, when Mangel's came into

6

this situation in early May, did it make any attempt

7

to supervise or exert any control over what checks

8

could or could not be drawn?

9

A Based upon my instruction, yes.

10

Q Can you tell us what steps Mangel's

11

took?

12

A Well, Mr. Harris was in their office, I

13

know, several days a week at the outset, and came back

14

and recommended that in view of the fact that he would

15

be leaving the company, that we close -- we suggest

16

that they close their office and move their offices

17

close to us for two reasons: in the event of the

18

confirmation, it would be a simple changeover, and

19

another one is that we would be in a position to

20

talk to them on a day-to-day basis to help them along.

21

Q Was there any supervision or attempt

22

to exert control by Mangel's over what checks the Fabric

23

Tree could draw on its accounts?

24

A I didn't get involved in that until June

25

24th.

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Q Up to June 24th was there any super-

4

vision or any control over what checks Fabric Tree

5

could draw?

6

A All I recall is that I talked to Mr. Hoffman

7

about that and his response to me was that, on several

8

occasions, they insisted upon making certain payments

9

against his judgment, which is what led up to our meet-

10

ing in your office, part of the reason I should say.

11

Q

Even after June 24th has there

12

been any restriction or any control exerted by Mangel's

13

over what checks the Fabric Tree can draw, with the

14

exception of the resolution which was filed with the

15

Citibank on or about July 5th or 6th, providing

16

that no transfers could be made from that account,

17

other than to Mangel's?

18

A Between June 24th and July 6th, Fabric Tree

19

issued a number of checks, several of which I objected

20

to. I urged. I pleaded. I begged that they stop

21

payment on those checks.

22

Mr. Felner advised me that he was told by

23

counsel to pay these claims in order to reduce administra-

24

tion expenses.

25

I could not compel him to stop payment.

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Lamm

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On July 6th or 7th, we finally got down to grips with it and insisted that we have the right to have the funds payable to us, because, as I recall, that was the letter and spirit of the agreement.

Q You say that it was the letter of the agreement. Can you or your counsel direct our attention to anything in the agreement so providing?

MR. ROSENBERG: Objection. It speaks for itself.

MR. CRAMES: I beg to differ on that objection this time, your Honor, because Mr. Lamm has --

THE JUDGE: He is really asking for an offer.

MR. CRAMES: He has referred us to the letter of the agreement, and I think that we are entitled to that.

THE WITNESS: It is Paragraph 8 entitled, "Collection," in the loan and security agreement.

Q Is there anything else in the agreement that you would refer us to in response to this

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Lamm

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3 point?

4 A I can't recall that offhand.

5 Q Mr. Lamm, this agreement was signed
6 on May 4, 1976, was it not?

7 A Yes, sir.

8 Q The execution of this agreement and
9 its implementation were authorized by this Court's order
10 of May 7, 1976; is that not correct?

11 A Yes.

12 Q What steps, if any, did Mangel's
13 take to implement Paragraph 8 of this agreement?14 A On July 6th we insisted that Fabric Tree ar-
15 range to have all funds made payable to Mangel's
16 Stores with a further request that all funds from
17 store depositories be transferred into their account.18 Q Were any steps taken between the
19 execution of the agreement in May and July 6th?

20 A No.

21 Q Were you or were others at Mangel's
22 aware of the fact that moneys were being received at
23 store levels and were being transferred to and de-
24 posited in Fabric Tree accounts and that Fabric
25 Tree was free to issue checkson those accounts? Were

1

Lamm

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3

you aware of that?

4

A Yes, I became aware of that later.

5

Q

6

Other than the resolution which was, as I understand, executed and delivered to the Citibank, has there been effectuated any other control, to your knowledge, over the disbursal of moneys by Fabric Tree?

9

10

A I have to refer that to Mr. Hoffman. I don't know of any other specific controls that may have been imposed.

12

13

MR. CRAMES: I have nothing further of this witness, your Honor.

14

15

MR. FABRIZIO: I have a few questions.

16

BY MR. FABRIZIO:

17

Q

Were you present in this courthouse on the afternoon of July 15, 1976?

18

19

A Yes.

20

Q

Do you recall a discussion in Judge Babitt's courtroom wherein Mr. Crames advised you that he intended to go forward with a hearing on confirmation and by virtue of the waiver of certain fees and allowances he would try to demonstrate to the Court that the debtor could comply with the

21
22
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Lamm

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3 \$600,000 limitation?

4

A I recall that. I said that I would chal-
5 lenge that.

6

Q Did you strenuously object to his
7 proceeding in this matter?

8

A Yes.

9

Q Did you use words to the effect
10 that this would undo much that had been done in the
11 Mangel's proceeding?

12

A If I could just change one word. I would
13 change "would" to "could," yes.

14

Q You were referring to the Mangel's
15 Chapter XI proceeding?

16

A Yes.

17

Q Who represented Mangel's in that
18 proceeding?

19

A Levin & Weintraub.

20

Q Did you also use the phrase that if
21 the debtor proceeded with the hearing there would be a
22 great deal of mud-slinging?

23

A I don't recall that.

24

Q Did you advise Mr. Crammes that you
25 felt that he would never be able to hold Mangel's to

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Lamm

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3

the agreement to fund the plan?

4

A I am trying to think of your question.

5

Would you repeat it, please?

6

(The question was read.)

7

A On the ground that I took the position that he did not have the \$600,000 number.

9

Q

Did you also advise the debtor that if it proceeded with such a hearing, that Mangel's would attempt to foreclose on the --

11

12

A I am not a lawyer and I cannot respond to that.

13

14

Q

Did you advise the debtor that if it proceeded with the hearing that Mangel's would not continue to guarantee the supply of inventory to the debtor?

15

16

17

18

A On July 15th I would discontinue immediately.

19

Q

If he porceeded with the hearing on confirmation?

20

21

A No, if the confirmation was not effected. I could not stop him.

22

23

Q

Did you object to him proceeding in the way that he outlined?

24

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A I said that I would object, yes.

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Q Did the debtor subsequently proceed with the hearing on confirmation that day?

A I don't know what the legal involvements are. I know that we had a hearing with Judge Lesser and there was no confirmation that day.

Q Was there any hearing at which testimony was taken to attempt to show that the debtor could or could not comply with the \$600,000 limitation?

A I don't recall such a hearing.

MR. FABRIZIO: No further questions.

REDIRECT EXAMINATION

BY MR. ROSENBERG:

Q Were you present subsequent to the time that counsel was just speaking of in an informal hearing before Judge Lesser?

A On July 15th?

Q Yes.

A Yes, sir.

Q Immediately after the time to which counsel has been referring or that same afternoon?

A Yes.

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Q Do you recall any statements of Mr. Crames at that time as to whether or not he could meet the \$600,000 figure on that day?

A He said he could, and I said I would challenge it because I believed that he did not have --

Q I am talking about the time during which Judge Lesser sat down with the participants for a final discussion.

A There was no reference to their ability to bring the number down to 160.

Q Prior to July 1, 1976, did you instruct Mr. Hoffman to request of the debtor that a representative of Mangel's see checks for disbursements prior to the time that they went out?

MR. CRAMES: Could that be pointed?

A Yes.

Q What was the earliest date on which you would have so instructed Mr. Hoffman?

MR. CRAMES: Would have or did?

MR. ROSENBERG: Did.

A My recollection is that Mr. Hoffman and I chatted about the fact that he could not control

1

Lamm

2

3 the flow of funds, sometime prior to June 29th,
4 but I can't place the date, whereupon I remember
5 looking at this specific contract Paragraph 8, and I
6 called Mr. Felner and asked him why we should not
7 have control of the disbursements.

8

Q What did he say to you?

9

A He said that we didn't have any right.

10

MR. ROSENBERG: I have no further

11

questions.

12

MR. CRAMES: I have nothing further,

13

your Honor.

14

THE JUDGE: Anything else, gentle-

15

men?

16

MR. CRAMES: No, your Honor.

17

THE JUDGE: Let me ask you gentle-

18

men a question. Let us close the record

19

on this testimony now.

20

21

22

23

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25

Fabric Tree

C E R T I F I C A T E

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

I, MICHAEL CATANIA, a Shorthand
Reporter and Notary Public of the State of
New York, do hereby certify:

That RICHARD FELNER, RICHARD
ECHIKSON, NATHAN HOFFMAN and JOSEPH H. LAMM,
the witnesses whose proceedings are herein-
before set forth, were duly sworn and that
such proceedings are true records of the
testimony given by such witnesses.

I further certify that I am not re-
lated to any of the parties to this matter
by blood or marriage; and that I am in no
way interested in the outcome of this
matter.

Michael Catania

July 27, 1976

Fabric Tree

I N D E X

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Richard Felner	53	68	87	95
	100 *	105		
Richard Echikson	106	124	132	133
Nathan Hoffman	134	142	162	170
Joseph H. Lamm	171	175	205	

E X H I B I T SDEBTOR'SFOR
IDENT.IN
EVID.

1	Plan filed by Fabric Tree deemed marked		54
2	Purchase and sale agreement dated May 4, 1976, among Mr. Echikson, Mr. Felner and the Mangel's Store Corporation		116
3	Commitment letter with attached credit		131

MANGEL'S

1	Loan and security agreement		82
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COURT'S

1	Mangel's demand for funds, pur- suant to the loan agreement		86
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Debtor's Exhibit I

Plan filed by The Fabric Tree, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X

In re:

In Proceedings for an
Arrangement No. 75 B 1383

THE FABRIC TREE, INC.,

Debtor.

DEBTOR'S PLAN

-----X

The Fabric Tree, Inc., proposes the following Plan
pursuant to Chapter XI of the Bankruptcy Act.

ARTICLE I

ADMINISTRATION CREDITORS

The claim of each administration creditor shall be
paid in full upon confirmation in cash or upon such other
terms as may be agreed upon between any such administration
creditor and the debtor.

ARTICLE II

PRIORITY CREDITORS

The claim of each priority creditor as filed and allowed
shall be paid in full upon confirmation in cash or upon such
other terms as may be agreed upon between any such priority
creditor and the debtor.

ARTICLE III

GENERAL CREDITORS

The claims of general unsecured creditors as filed and
allowed shall be paid in full settlement, release and discharge
thereof, 15% in cash upon confirmation, without interest.

Dated: New York, New York
May 5, 1976.

THE FABRIC TREE, INC.,

By: Richard E. Eickson
Richard Eickson, President

Debtor's Exhibit 2
Purchase and Sale Agreement
dated May 4, 1976

PURCHASE AND SALE AGREEMENT

AGREEMENT made this 4th day of May, 1976 between RICHARD ECHIKSON, residing at 10 Ocean Court, Elberon, New Jersey 07740 and RICHARD M. FELNER, residing at 1 Wellhouse Close, Mamaroneck, New York 10543, as Sellers, and MANGEL STORES CORPORATION ("Mangels"), a Delaware corporation, having its principal place of business at 5611 Tonnelle Avenue, North Bergen, New Jersey 07047, as Purchaser.

WHEREAS, the Sellers own all of the stock of The Fabric Tree, Inc. ("Fabric"), a New York corporation, having its principal place of business at 18 East 41st Street, New York, New York; and

WHEREAS, on August 6, 1975 Fabric filed a petition for an arrangement with its creditors pursuant to Chapter XI of the Bankruptcy Act and the proceedings pursuant to such petition (hereinafter the "Proceedings") are pending in the United States District Court for the Southern District of New York; and

WHEREAS, Mangels intends to make an offer (the "Offer") to the creditors in such Proceedings to advance, loan or contribute to Fabric an amount sufficient to pay general unsecured creditors in the Proceedings 15% of their claims (up to a maximum of \$450,000) in cash upon confirmation, plus administrative expenses and priority claims (up to a maximum of \$150,000);

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

1. The purchase and sale herein provided for is conditioned upon the confirmation on or before July 15, 1976 by the Bankruptcy Court in the Proceedings of a Plan of Arrangement with creditors of Fabric, based upon the Offer and providing for payments to creditors from funds furnished by Mangels (the "Plan"), as set forth above. If no Plan is confirmed by that date, this Agreement shall terminate without any liability hereunder of any party hereto to any other party hereto.

2. The Sellers each own the number of shares of common stock of Fabric set forth opposite their names on Exhibit A hereto. Such shares are hereinafter referred to as the "Stock". Subject to the conditions set forth in this Agreement, the Sellers agree to sell to Mangels and Mangels agrees to purchase from the Sellers the Stock on the date when an order confirming the Plan becomes the final order not subject to further appeal within the meaning of Bankruptcy Rule 803 (the "Confirmation Date"), at a purchase price of \$1, plus an additional purchase price determined and paid as provided in paragraph 3 below. All payments of the purchase price and the additional purchase price shall be made to each Seller in the same proportion that the proportion of the Stock owned by such Seller bears to

all the Stock, as set forth in Exhibit A.

On the Confirmation Date, the Sellers shall deliver to Mangels (a) stock certificates representing all of the Stock, duly endorsed in blank, with stock transfer stamps affixed thereto; and (b) resignations of all directors of Fabric.

3. The additional purchase price for the Stock shall be determined and paid as hereinafter set forth:

(A) Except as otherwise provided herein, for each of the three consecutive twelve-month periods beginning on August 1 of 1976, 1977 and 1978, Mangels shall pay to the Sellers the "Annual Payment", which shall be 50% of "Annual Profits", which shall be determined as follows:

From an amount equal to the direct store operating profits, as determined by Mangels in accordance with its usual accounting practices, for each such twelve-month period of the stores operated by Mangels or Fabric at the locations set forth on Exhibit B for all or any part of such period, there shall be deducted an amount equal to the sum of the following:

- (i) An amount equal to 8% of the total sales at such store locations for such twelve-month period; and
- (ii) \$93,333.

(B) Prior to the payment of the Annual Payments to the Sellers, there shall be deducted an amount calculated as follows:

- (a) \$400,000,
less the total of cash of Fabric on July 31, 1976
in excess of any amount contributed
by Mangels pursuant to the Plan;
and
 - (b) the value of the inventories of
Fabric on July 31, 1976 (determined
as provided in subparagraph 3(E)
below); and
 - (c) any amount by which payments to
general unsecured creditors in the
Proceedings pursuant to the Offer
are less than \$450,000; and
 - (d) prepaid items as set forth in Exhibit E
- plus
- (e) all liabilities of Fabric on July 31,
1976, with the exception of liabil-
ities to Mangels for funds loaned
to Fabric pursuant to the Offer.

The foregoing deduction shall be applied in reduction of the Annual Payments in the order of their due dates and the Annual Payments shall be paid to the Sellers only when and to the extent that the aggregate Annual Payments exceed such deduction.

(C) All or any portion of the Annual Payment for each twelve-month period which shall be due after application of the deductions described above shall be paid to the Sellers within 90 days after the termination of such twelve-month period, provided, however, that the aggregate of the Annual Payments shall in no event exceed \$500,000.

(D) If the Annual Profits, as calculated for any twelve-month period shall be less than zero, the amount by which such Annual Profits are less than zero shall also be deducted in making the calculations of Annual Profits for the following twelve-month period.

(E) For purposes of the calculation of the deductions described above, Mangels shall cause an inventory to be taken at the store locations set forth on Exhibit B on or about July 31, 1976 and the value of the Fabric inventories at July 31, 1976 shall be based upon the retail method of inventory valuation at the lower of cost or market and shall be determined on a consistent basis with the valuation of inventories of Fabric in its audited financial statements for the fiscal year ended February 1, 1975.

(F) Notwithstanding that payments to the Sellers may be affected by the number of store locations operated during the periods described above, Mangels shall have the

right to close any such store set forth on Exhibit B at any time during such three-year period or to convert the operations of any such store from the sale of fabrics to the sale of ladies wear or other retail items.

4. The Sellers hereby represent and warrant to, and agree with, Mangels as follows:

(A) Fabric and each of its subsidiaries is, and on the Confirmation Date will be (i) duly organized and existing under the laws of its respective jurisdiction of incorporation, and (ii) duly qualified and in good standing as a foreign corporation in each state in which it operates a store or holds a lease, as set forth on Exhibit B hereto.

(B) Fabric, or a wholly-owned subsidiary of Fabric, has a valid, existing and binding lease on each of the store locations set forth in Exhibit B, which are enforceable against the landlords thereunder in accordance with their terms, and there is no default under any such leases, except a default based upon the Proceedings, or a default set forth on Exhibit B hereto. True and correct copies of all such leases have been supplied to Mangels. Each landlord of a lease described on Exhibit B has accepted rent paid during the pendency of the Proceedings, and, except as set forth on Exhibit B, no landlord has indicated to Fabric any intent to cancel or terminate any such lease based upon a claim that the Proceedings constitute a breach or default under the

terms of the lease. Fabric will not sell, assign or disaffirm any lease set forth on Exhibit B between the date hereof and the Confirmation Date without the written consent of Mangels.

(C) The Sellers will obtain, before or within 180 days after the Confirmation Date, the consents of landlords of not less than 15 of the leases described on Exhibit B, to amend or modify the "use" restrictions in such leases to permit the operation of a ladies wear specialty store in such locations,* Mangels will cooperate with Sellers in obtaining the agreements of landlords of such leases to changes in such "use" restrictions by agreeing to reasonable requests of the landlords for other modifications of such leases which are not materially adverse to Mangels or Fabric. In the event of any breach of this representation and agreement by the Sellers, Mangels' obligation to make additional payments for the Stock pursuant to Paragraphs 2 and 3 hereof shall terminate.

(D) The Stock represents all of the issued and outstanding stock of all classes of Fabric, and there are not in existence any rights, warrants or options to purchase or acquire any shares of stock of any class from Fabric.

(E) Each Seller has good, valid and marketable title to the number of shares of Stock set forth opposite his name on Exhibit A, and on the Confirmation Date will

*Which consent may be conditioned upon Mangels' commitment to operate such a store at such location.

convey good, valid and marketable title to such shares to Mange's free and clear of all liens and encumbrances whatsoever.

(F) Neither Fabric nor any of its subsidiaries has any material contracts or other commitments, oral or written, to which it is a party or by which it is bound, except as set forth on Exhibits B and C hereto.

(G) Except for the Proceedings, Sellers have no knowledge of any litigation, proceeding or investigation, governmental or otherwise, pending or threatened against Fabric or any of its subsidiaries, or involving any of their properties or businesses, and the operation of the business of Fabric or of any such subsidiary does not violate any federal, state or local law or ordinance or any rule, regulation or decree of any governmental authority.

(H) On the Confirmation Date, Fabric will not have liabilities not dischargeable in the Proceedings in excess of \$5,500, and will not have administrative claims in the Proceedings in excess of \$150,000.

5. This Agreement and the rights and obligations hereunder shall inure to the benefit of and shall be binding upon the parties hereto and their respective heirs, representatives, successors and assigns.

6. Any notices, requests or other communications pursuant to this Agreement shall be in writing and shall be deemed to be duly given if delivered by hand or if mailed by United States certified or registered mail, return receipt requested, postage prepaid, to the parties at the following addresses (or at such other address as shall be designated in writing by any party to the others):

If to the Sellers:

At their residence addresses
shown above.

If to Mangels:

Mangel Stores Corporation
5611 Tonnelles Avenue
North Bergen, New Jersey 07047

Attention: President

7. All representations, warranties and agreements of Sellers contained in this Agreement or in any documents delivered at the closing or made pursuant to this Agreement shall be joint and several and shall survive the closing hereunder, notwithstanding any information to or investigation made by Mangels.

8. This Agreement may not be amended or terminated orally, but only by an instrument in writing, executed by the parties hereto.

9. This Agreement and the rights and obligations of the parties hereunder shall be construed and interpreted in accordance with the laws of the State of New York.

10. The Sellers shall have no right to assign any rights or obligations pursuant to this Agreement to any person without the written consent of Mangels.

11. On the Confirmation Date the parties shall enter into employment agreements by which Mangels shall employ each of the Sellers for a period of one year, which employment agreements will be in the form of Exhibit D hereto.

12. Upon request by Mangels at any time prior to the confirmation of the Plan by the Bankruptcy Court, the Sellers will cause Fabric to disaffirm any lease described on Exhibit B in the Proceedings. In the event of such a disaffirmance at the request of Mangels, Mangels will amend the Offer to increase the maximum amount which it will pay with respect to general unsecured claims in the Proceedings to \$450,000, plus 15% of the increased liabilities resulting from such lease disaffirmance.

IN WITNESS WHEREOF, the parties hereto have

executed this Agreement as of the day and year first above written.

Richard Echikson
Richard Echikson

Richard M. Felner
Richard M. Felner

Sellers

MANGEL STORES CORPORATION

BY [Signature] V.P. [Signature]

Purchaser

EXHIBIT A TO PURCHASE AND SALE AGREEMENT
DATED ~~APRIL 27~~ 27, 1976 BETWEEN RICHARD ECHIKSON
AND RICHARD M. FELNER, AS SELLERS, AND
MANGEL STORES CORPORATION, AS PURCHASER

STOCK OWNERSHIP

Richard Echikson

100 Shares of Common Stock
of The Fabric Tree, Inc.

Richard M. Felner

100 Shares of Common Stock
of The Fabric Tree, Inc.

EXHIBIT BSCHEDULE OF THE FABRIC TREE, INC. LEASES

<u>Location</u>	<u>Landlord</u>	<u>Termination Date</u>
1) Trumbull Park Shopping Center Trumbull, Conn.	The Frouge Corporation	(after last renewal option) 10/30/80
2) Colonie Shopping Center, Albany, New York	Homart Development, Inc.	1/1/77
3) New London Mall, New London, Conn.	Bayonart Realty Corp.	8/30/83
4) Eastfield Mall Shopping Center, Springfield, Mass.	Eastfield Mall, Inc.	10/31/83
5) Willingboro Plaza, Willingboro, New Jersey	Levitt and Sons, Incor- porated	2/77
6) Willowbrook Shopping Center, Wayne, New Jersey	The Willowbrook Corpora- tion	10/31/84
7) Nanuet Shopping Center Nanuet, New York	Homart Development Co., Inc.	12/31/84
8) Woodbridge Shopping Center Woodbridge, New Jersey	Woodbridge Center, Inc.	10/31/86
9) Orange Plaza Shopping Center Route 211-E Middletown, N. Y.	Boehm Development Corp.	10/31/93
10) Plymouth Meeting Mall Plymouth Meeting, Pa.	Plymouth Meeting Mall, Inc.	10/76
11) Cedarbrook Mall Cheltanham, Pennsylvania	Cedarbrook Joint Venture	8/76
12) Moorestown Shopping Center Moorestown, New Jersey	Moorestown Center, Inc.	8/76
13) Neshaminy Mall Shopping Center Cornwells Heights, Pa.	Neshaminy Associates	9/1/88
14) Echelon Mall Vorhees, New Jersey	Echelon Mall, Inc.	1981
15) Pembroke Square Shopping Center Virginia Beach, Virginia	Pembroke Square Associates	9/30/81

EXHIBIT B (Continued)

	<u>Location</u>	<u>Landlord</u>	<u>Termination Date</u>
16)	Reistertown Road Plaza Baltimore, Maryland	Reistertown Road Plaza, Inc.	8/31/82
17)	Montgomery Mall Bethesda, Maryland	Montgomery Mall	3/31/88
18)	Tysons Corner Regional Shopping Center Fairfax County, Virginia	Tysons Corner Regional Shopping Center	9/88
19)	Concord Mall Wilmington, Delaware	Concord Mall	3/31/89
20)	Beltway Plaza Regional Greenbeld, Md.	First National Realty Corporation	11/30/86
21)	South Hills Village Upper Saint Clair Township, Pennsylvania	Edward J. Lewis and Donald Soffer d/b/a Oxford Development Company	10/30/80
22)	Northway Mall Shopping Center Pittsburgh, Pennsylvania	Northway Mall, Inc.	10/31/78
23)	Greengate Mall Greensburg, Pennsylvania	Greengate Mall, Inc.	10/31/82
24)	Monroeville Mall Monroeville, Pennsylvania	Don-Mart Realty	1/84
25)	Beaver Valley Mall Center Township, Pa.	Beaver Valley Mall, Inc.	2008
26)	Fairmont Fair Shopping Center Syracuse, New York	Fairmont Fair Development Corporation	1/30/88
27)	Shop City Shopping Center Syracuse, New York	Upper New York Realty Co.	7/31/79
28)	Northern Lights Shopping Center Salina, New York	Lester Gross and Samuel J. Weinstein, as Trustees	5/31/80
29)	Cloverleaf Mall Richmond, Virginia		8/31/87
30)	Shore Mall Pleasantville, N. J.		12/31/86
31)	Tri-County Mall Baldwinsville, N. Y.		5/31/83
32)	Roosevelt Field Center Garden City, New York		8/31/81
33)	Korvette Shopping Center Portchester, New York		12/31/92

EXHIBIT ~~Q~~ ⁴ TO PURCHASE AND SALE AGREEMENT
DATED ~~APRIL 27~~ ^{APRIL 27}, 1976 BETWEEN RICHARD ECHIKSON
AND RICHARD M. FELNER, AS SELLERS, AND
MANGEL STORES CORPORATION, AS PURCHASER

NONE

2518

EXHIBIT D TO PURCHASE AND SALE AGREEMENT DATED May 4, 1976
BETWEEN RICHARD ECHIKSON AND RICHARD M. FELNER, AS SELLERS, AND
MANGEL STORES CORPORATION, AS PURCHASER

EMPLOYMENT AGREEMENT

AGREEMENT made this day of , 1976
between , hereinafter called the "Employee"
and MANGEL STORES CORPORATION, a Delaware corporation, herein-
after called the "Company".

WHEREAS, the Board of Directors of the Company has
determined that it would be desirable and in the best interest
of the Company to employ the Employee and the Employee wishes
to be employed by the Company;

NOW, THEREFORE, in consideration of the mutual
promises herein contained, the Company and the Employee agree
as follows:

1. Employment. The Company employs the Employee
and the Employee accepts employment upon the terms and condi-
tions hereinafter set forth.
2. Term. The term of this Agreement shall begin on
the date hereof and shall terminate on or at any time after one
year from the date hereof upon four months' prior written notice.
3. Compensation. As compensation in full for the
services hereunder, the Company shall pay and the Employee
shall accept an annual salary of Sixty Thousand (\$60,000)
Dollars, payable in equal monthly installments or at such
other times as other employees of the Company are paid.

4. Duties. The precise services to be rendered by the Employee may be extended or curtailed, from time to time, at the discretion of the President and the Board of Directors of the Company. If the Employee is elected or appointed a director or an officer of the Company during the term of this Agreement, the Employee shall serve in such capacity or capacities without further compensation; but nothing herein shall be construed as requiring the Company, or its stockholders, to cause the election or appointment of the Employee as a director or officer.

5. Extent of Service. The Employee shall devote his entire time, attention, skill and energy to the business, welfare and affairs of the Company, shall use his best efforts to promote the interests of the Company, and shall not, during the term of this Agreement, be engaged in any other business activity whether or not such business activity is pursued for gain, profit, or other pecuniary advantage; but this shall not be deemed to prohibit the Employee, during the term of this Agreement, from investing his assets in such form or manner as will not require any services on the part of the Employee in the operations or the affairs of the companies in which such investments are made.

6. Expenses. In addition to the compensation provided for in paragraph 3 hereof, the Company shall re-

reimburse the Employee for out-of-pocket expenses incurred on behalf of the Company in a reasonable amount upon presentation of vouchers in form acceptable to the financial officer of the Company.

7. Illness. If the Employee fails, because of illness or other incapacity, for a period of three (3) consecutive months to render the services of the character contemplated in this Agreement, the Board of Directors of the Company may determine that the Employee has become totally disabled. In the event of such determination, the Company shall be obligated to pay the Employee his compensation only to the date when such determination is made. If at any time during the term of this Agreement after such determination of disability shall have been made, the Employee shall become able to perform the duties required of him hereunder, he shall immediately give notice to the Company of such fact. Within fourteen (14) days of the receipt of such notice, the Company shall give notice to the Employee, at its option: (a) that the Employee may resume his practice with the Company and shall be entitled to the benefits thereof as provided for herein; or (b) that the Company has decided to terminate this Agreement. In the event that the Company notifies the Employee that this Agreement has been terminated as aforesaid, all obligations of the Company and the Employee hereunder shall cease, except

that the Employee shall remain subject to the provisions of paragraphs 9, 10(a), 10(c) and 11 hereof.

8. Death. In the event of the death of the Employee during the term of this Agreement, the Company shall pay to the estate of the Employee the compensation which would otherwise be payable to the Employee to the date of his death, and for a period of three (3) months thereafter.

9. Disclosure of Information. During the term of this Agreement and at any time thereafter the Employee shall not for any reason or purpose whatsoever, other than as required in connection with any litigation, disclose to any private person, firm or corporation, any confidential information concerning the conduct of the business and affairs of the Company which he may have acquired in the course of or as an incident to his employment by the Company.

10. Restrictive Covenants. (a) From and after the date of this Agreement, unless acting as an officer or employee of the Company or with the Company's prior written consent, the Employee shall not, directly or indirectly, own, manage, operate, join, control or participate in the ownership, management, operation and control of, or be connected as an officer, employee, partner, licensor, or in any capacity whatsoever with, any business under any name similar to the Company's name.

(b) During the term of this Agreement, the Employee shall not, directly or indirectly as owner, partner, joint venturer, employee, broker, agent, principal corporate officer, licensor or in any other capacity whatsoever engage or become interested in, or have any connection with, any business which is competitive with any of the business activities of the Company.

(c) During the term of this Agreement and at any time thereafter, the Employee shall not, directly or indirectly, induce, or attempt to influence, any of the officers or employees of the Company to terminate his employment with the Company, or any of the customers of the Company to terminate his relationship with the Company.

11. Remedy for Breach. (a) Both parties recognize that the services to be rendered under this Agreement by the Employee are special, unique, and of extraordinary character, and, therefore, in the event of the breach by the Employee of any of the terms and conditions of this Agreement to be performed by him or in the event that the Employee, without the written consent of the Company, shall leave its employment and perform, during the term of this Agreement, services for any person, firm or corporation engaged in a competing line of business with the Company, then the Company shall be entitled, if it so elects, to institute and

prosecute proceedings in any court of competent jurisdiction, either in law or in equity, to obtain damages for any breach of this Agreement, or to enforce the specific performance thereof by the Employee, or to enjoin the Employee from performing services for any such other person, firm or corporation, during the period herein contracted for. The remedies mentioned specifically herein are in addition to those otherwise available, in law or in equity, to the Company, and the enumeration of remedies herein shall not be construed to prevent the Company as it may elect, from invoking any such additional remedies in the event of any breach of this Agreement by the Employee.

12. Notices. All notices under this Agreement must be in writing, and if to the Company, will be duly given if delivered by hand, or if addressed and mailed by certified mail, return receipt requested, to the Company at 5611 Tonnelle Ave., North Bergen, New Jersey 07047, or at such other address as the Company may hereafter designate by notice, or if to the Employee, will be duly given if delivered by hand, or if addressed and mailed, by certified mail, return receipt requested to the Employee at

, or at such other address as may appear as the home address of the Employee in the records of the Company.

13. Waiver of Breach. The waiver by the Company of a breach by the Employee of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by the Employee.

14. Successors and Assigns. This Agreement shall inure to the benefit of and be binding upon the Company, its successors and assigns, including but not limited to any corporation which may acquire all or substantially all of the Company's assets and business or with or into which the Company may be consolidated or merged, and upon the Employee, his heirs, executors, administrators, and legal representatives;

15. Entire Agreement. This instrument contains the entire agreement of the parties. It may not be changed or terminated orally, but may be changed only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification, extension, discharge or termination is sought. It will be governed by the laws of the State of New York.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

MANGEL STORES CORPORATION

By _____

Employee

EXHIBIT E TO PURCHASE AND SALE AGREEMENT
DATED MAY 4, 1976 BETWEEN RICHARD ECHIKSON
AND RICHARD M. FELNER, AS SELLERS, AND
MANGEL STORES CORPORATION, AS PURCHASER

PREPAID AND SIMILAR ITEMS

Prepaid rents, prepaid insurance, prepayments to vendors,
prepaid advertising and mailers, utilities deposits,
credit card receivables, rental income receivables,
lease sale receivables, amounts due from vendors, tax
refund receivables.

The foregoing receivables shall be included only when
realized.

Debtor's Exhibit 3
Commitment Letter

2408
111-523

MANGEL STORES CORPORATION
5611 TONNELLE AVE.
NORTH BERGEN, N. J.

To: The Official Creditors' Committee of The Fabric Tree, Inc.,
c/o Christopher Ballaban, Chairman

Gentlemen:

This is to advise you that the undersigned has entered into an agreement with the principal shareholders of The Fabric Tree, Inc. providing for an acquisition by the undersigned of all of the stock of said company and the funding by the undersigned of a 15% all cash Plan for creditors in the pending Chapter XI proceedings. Computation of the funds needed for confirmation indicates that no more than \$600,000.00 shall be required to effectuate confirmation of a Plan as previously described, including payment in full of all priority claims and expenses of administration in the Chapter XI proceeding, inclusive of charges due the Referee's Salary and Expense Fund. The aforesaid computation is based upon 15% of \$3,000,000.00 (the maximum amount of unsecured indebtedness) which amounts to \$450,000.00, and a total sum of \$150,000.00 to pay in full all of the priority and administration expenses as heretofore described.

As an indication of our ability to fund a Plan as previously described, and in order to induce the Committee to solicit consents to said Plan, we deliver to you herewith a Certificate of Deposit issued by Sterling National Bank, payable to our order. The funds represented by this Certificate of Deposit shall be employed only for confirmation of a Plan as previously described and are to be held by you as escrowee under the following terms and conditions:

1. The entry of an order by the Bankruptcy Court confirming a Plan as previously outlined on or before July 15, 1976, provided that the amount necessary to confirm said Plan shall not exceed \$450,000.00 for the payment of unsecured claims as filed and allowed, and \$150,000.00 for all priority and administration expenses as previously referred to.

2. The entry of an order not later than May 10, 1976 by the Bankruptcy Court in form satisfactory to our counsel granting to us a first and continuing security interest in and to all assets of The Fabric Tree, Inc. of any kind, nature and description wherever located.

In the event that either of the foregoing conditions is not satisfied, you shall return the Certificate of Deposit to us upon our demand at the above address or such other address as we shall direct.

You will note that the Certificate of Deposit delivered to you herewith bears interest at the rate of 5-1/4% per annum and matures on September 2, 1976. It is a condition to our commitment hereunder that the Certificate of Deposit delivered to you hereunder shall be employed for purposes of making the deposit necessary for confirmation of the arrangement proceedings and that appropriate provisions shall be made in the order which confirms the arrangement proceedings providing that the interest accruing and which has accrued on said Certificate of Deposit shall be paid over to Mangel Stores Corporation upon its maturity in accordance with the terms and provisions of said order of confirmation.

If all of the foregoing terms and conditions are satisfactory to you, would you kindly note your consent and approval in the space provided on the copy of this letter.

Very truly yours,

MANGEL STORES CORPORATION

Nathan Hoffman,
Vice President

AGREED AND ACCEPTED:

Official Creditors' Committee of
THE FABRIC TREE, INC.
by Christopher Ballaban, Chairman

Mangel Stores Corp.'s Exhibit I
Loan and Security Agreement
dated May 4, 1976

LOAN AND SECURITY AGREEMENT

AGREEMENT, made this 4th day of May, 1976, by and among MANGEL STORES CORPORATION, a Delaware corporation, having its principal place of business at 5611 Tonnelles Avenue, North Bergen, New Jersey 07047 (hereinafter referred to as "Mangels"), THE FABRIC TREE, INC., a New York corporation, having its principal place of business at 18 East 41st Street, New York, N.Y. 10017 (hereinafter referred to as "Fabric"), and all the subsidiaries of Fabric whose names are set forth at the conclusion of this Agreement (hereinafter collectively referred to as the "Subsidiaries").

W I T N E S S E T H :

WHEREAS, on August 6, 1975 Fabric filed a petition for an arrangement with its creditors pursuant to Chapter XI of the Bankruptcy Act and the proceedings pursuant to such petition (hereinafter referred to as the "Proceedings") are pending in the United States District Court for the Southern District of New York; and

WHEREAS, Mangels intends to provide funds to Fabric to confirm a plan of arrangement in the Proceedings and in connection therewith has contracted to purchase all of the outstanding common stock of Fabric; and

WHEREAS, Mangels has agreed to loan to Fabric, as

hereinafter set forth, an aggregate amount of \$ 323,360.84 ^{1/2} owed by Fabric to Active Purchasing Corp. and Spilke Corporation, in accordance with an agreement of even date herewith among Mangels, such corporations and certain individuals (the "Basic Agreement"); and

WHEREAS, Mangels may from time to time provide additional financing to Fabric for working capital purposes; and

WHEREAS, Mangels is unwilling to make any advances to Fabric until Fabric shall execute and deliver this Loan and Security Agreement;

NOW, THEREFORE, in consideration of the premises and in order to induce Mangels to make the advances provided for in the Basic Agreement and advances needed from time to time for working capital purposes, Fabric agrees with Mangels as follows:

1. The Loans.

(a) Subject to the terms and conditions of this Agreement, Mangels shall lend Fabric the sum of \$ 338,560.84 ^{1/2} as follows:

(i) \$ 122,747.60 ^{1/2} on the date on which an order of the Bankruptcy Court approving this Agreement becomes final and non-appealable (the "Initial Payment Date")

(ii) \$107,786.⁴¹⁶² on the thirtieth day following the Initial Payment Date; and

(iii) \$107,786.⁴¹⁶² on the sixtieth day following the Initial Payment Date.

(b) From time to time hereafter Mangels may loan to Fabric additional amounts for merchandise purchases or other working capital purposes or may guarantee certain obligations of Fabric to merchandise suppliers.

(c) In the event that the Bankruptcy Court confirms a plan of arrangement based upon the offer of Mangels to fund such a plan, Mangels will lend to Fabric up to \$600,000. on the date when the order of confirmation of such a plan becomes a final and non-appealable order within the meaning of Bankruptcy Rule 803.

(d) Each Loan referred to in subsections 1(a), 1(b) and 1(c) above shall be evidenced by a demand promissory note in the form annexed hereto as Exhibit A (the "Notes").

(e) The Notes shall bear interest at the annual rate of 7%⁴¹⁶².

(f) All payments by Fabric on account of the Notes shall be made at Mangels' principal office at the address first above written.

(g) The proceeds of the Loans described in subsection 1(a) above shall be used only for payment to Spilke Corporation and Active Purchasing Corp. of Fabric's outstanding indebtedness to them and for no other purpose.

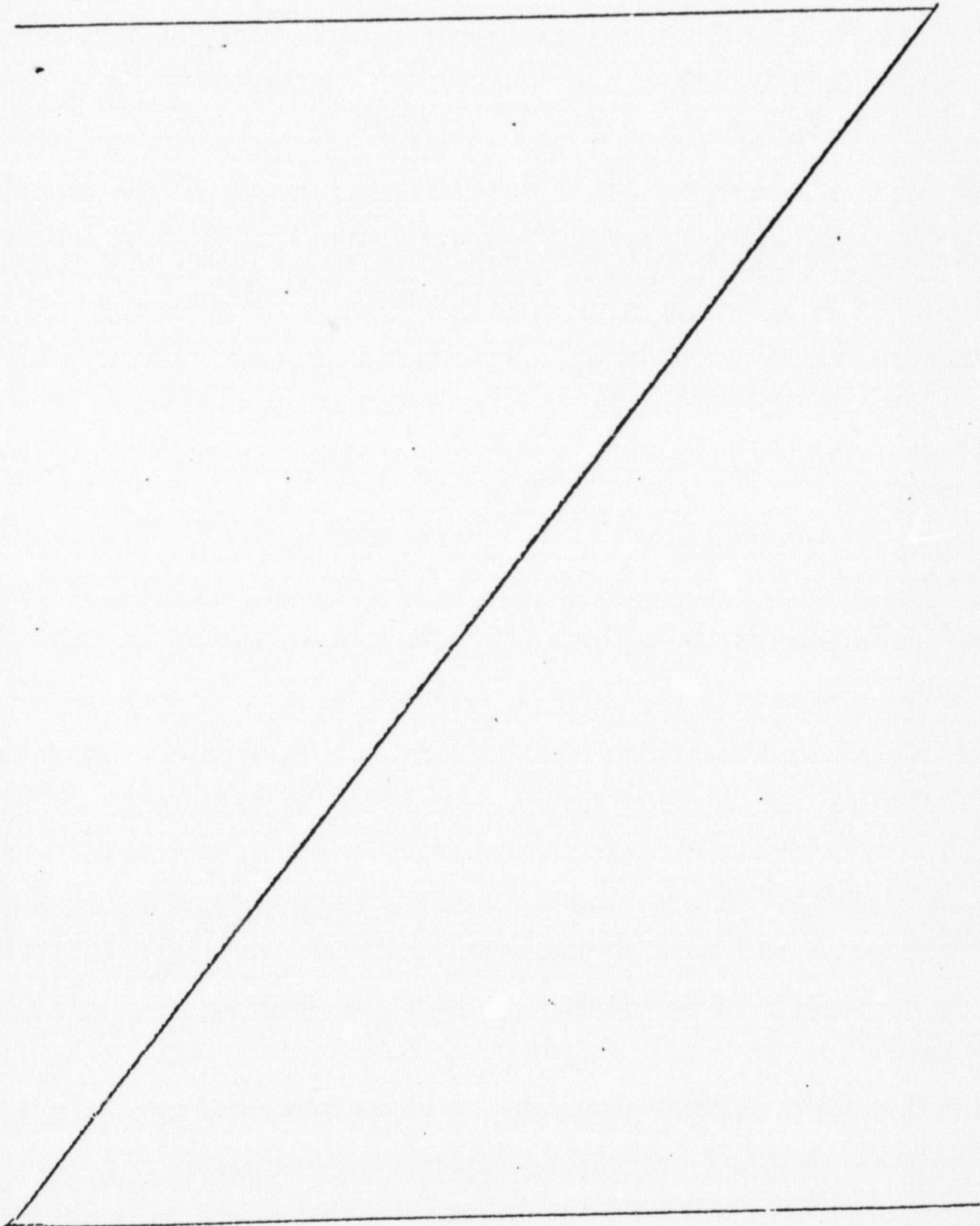
2. Security Interest.

To secure the due payment and performance of all indebtedness and other liabilities and obligations, whether now existing or hereafter arising, of Fabric to Mangels under, arising out of or in any way connected with this Agreement, the Notes, the Basic Agreement, the repayment of any amounts paid by Mangels pursuant to guaranties by Mangels issued to suppliers of merchandise to Fabric, the funding of the plan of arrangement of Fabric by Mangels and all instruments, agreements and documents executed, issued and delivered pursuant thereto, and any other obligations of Fabric to Mangels, whether now existing or hereafter arising, all hereinafter referred to collectively as the "Obligations", Fabric and the Subsidiaries hereby assign, mortgage, pledge, hypothecate, transfer and set over to Mangels and grant to Mangels a first lien upon and security interest in all assets of Fabric and the Subsidiaries set forth, referred to, or listed on Schedule I annexed hereto and made a part hereof (all hereinafter referred to as the "Collateral").

3. Pledge of Stock.

(a) The term "Pledged Stock" as used herein shall mean the issued and outstanding shares of the Subsidiaries and, also any stock certificate, option or rights issued by any of the Subsidiaries as an addition to, in substitution of or in exchange for any such shares, and any and all proceeds thereof, now or hereafter owned or acquired by Fabric.

(b) As additional collateral security for the
due payment and performance of the Obligations, Fabric hereby



pledges, assigns, hypothecates, delivers and sets over to Mangels all the Pledged Stock.

(c) If Fabric shall become entitled to receive or shall receive any stock certificate (including without limitation, any certificate representing a stock dividend or a distribution in connection with any reclassification, increase or reduction of capital), option or rights, whether as an addition to, in substitution of, or in exchange for any shares of the Pledged Stock, or otherwise, Fabric shall accept any such instruments as Mangels' agent, shall hold them in trust for Mangels, and shall deliver them forthwith to Mangels in the exact form received, with Fabric's endorsement when necessary and/or appropriate stock powers duly executed in blank, to be held by Mangels, subject to the terms hereof, as further collateral security for the Obligations.

(d) Any or all shares of the Pledged Stock held by Mangels hereunder may, at the option of Mangels, be registered in the name of Mangels or its nominee, and Mangels or its nominee may thereafter, without notice, and after any default by Fabric or the Subsidiaries in the performance of the Obligations, exercise all voting and corporate rights at any meeting of any corporation issuing any of the shares included in the Pledged Stock and exercise

any and all rights of conversion, exchange, subscription or any other rights, privileges or options pertaining to any shares of the Pledged Stock as if it were the absolute owner thereof, including, without limitation, the right to exchange, at its discretion, any and all of the Pledged Stock upon the merger, consolidation, reorganization, recapitalization or other readjustment of any corporation issuing any of such shares or upon the exercise by any such issuer of any right, privilege or option pertaining to any shares of the Pledged Stock, and in connection therewith, to deposit and deliver any and all of the Pledged Stock with any committee, depository, transfer agent, registrar or other designated agency upon such terms and conditions as it may determine, all without liability except to account for property actually received by it, but Mangels shall have no duty to exercise any of the aforesaid rights, privileges or options and shall not be responsible for any failure to do so or delay in so doing.

(e) In the event of any default by Fabric or the Subsidiaries in the performance of the Obligations, Mangels shall have the right to require that all cash dividends payable with respect to any part of the Pledged Stock be paid to Mangels to be held by Mangels as additional collateral security hereunder until applied to the Obligations.

4. Representations and Warranties.

Fabric and the Subsidiaries each warrant and represent to Mangels that:

(a) Each is a corporation duly organized, validly existing and in good standing under the laws of its state of incorporation, has the corporate power to own its assets and to transact the business in which it is presently engaged and is duly qualified and is in good standing in each of the jurisdictions, all as set forth on Schedule annexed hereto.

(b) The execution and delivery of this Agreement and the Notes and performance hereunder and thereunder, will not violate any provision of law and will not conflict with or result in a breach of any order, writ, injunction, ordinance, resolution, decree, or other similar document or instrument of any court or governmental authority, bureau or agency, domestic or foreign, or the charter or by-laws of Fabric or the Subsidiaries, or create a default under any agreement, bond, note or indenture to which any of them is a party or by which any of them is bound or any of their properties or assets is affected, or result in the imposition of any lien, charge or encumbrance of any nature whatsoever upon any of the properties or assets owned by or used in connection with their business, except as provided for *herein*

herein

(c) This Agreement has been duly executed and delivered and constitutes the valid and legally binding obligation of Fabric and the Subsidiaries, enforceable in accordance with its terms. The Notes when delivered pursuant to this Agreement shall constitute the valid and legally binding obligations of Fabric, enforceable in accordance with its terms.

(d) Each of Fabric and the Subsidiaries is, or to the extent that Schedule I to this Agreement states that the Collateral is to be acquired after the date hereof, will be, the owner of the Collateral, having good and marketable title thereto, free from any and all liens, security interests, encumbrances or claims. The liens and security interests created and granted by this Agreement constitute valid first liens on and security interests in the Collateral.

5. Perfection of Security Interest.

Fabric and the Subsidiaries will join with Mangels in executing one or more financing statements pursuant to the Uniform Commercial Code or other notices appropriate under applicable law in form satisfactory to Mangels and will pay all filing or recording costs with respect thereto, and all costs of filing or recording this Agreement or any other instrument, agreement or document executed and delivered pur-

suant hereto (including the cost of all Federal, state or local mortgage, documentary, stamp or other taxes), in each case, in all public offices where filing or recording is deemed by Mangels to be necessary or desirable.

6. General Covenants.

Fabric and the Subsidiaries shall:

(a) furnish Mangels from time to time at Mangels' request written statements and schedules further identifying and describing the Collateral in such detail as Mangels may reasonably require;

(b) advise Mangels promptly, in sufficient detail, of any substantial change in the Collateral, and of the occurrence of any event which would have a material effect on the value of Collateral or on Mangels' security interest therein;

(c) comply with all acts, rules, regulations, and orders of any legislative, administrative or judicial body or official, applicable to the Collateral or any part thereof or to the operation of Fabric's business.

7. Assignment of Insurance.

On the Initial Payment Date Fabric shall deliver to Mangels copies of, or certificates of the issuing companies with respect to, endorsements of any and all policies of insurance owned by Fabric or the Subsidiaries covering or in any manner relating to the Collateral, in form and substance satisfactory to Mangels, naming Mangels as an additional insured party as its interest may appear and indicating that the policy will not be terminated, or reduced in coverage or amount, without at least ten (10) days' prior written notice from the insurer to Mangels. As further security for the due payment and performance of the Obligations, Fabric and the Subsidiaries hereby assign to Mangels all sums, including returned or unearned premiums, which may become payable under or in respect of any policy of insurance owned by any of them covering or in any manner relating to the Collateral, and each of them hereby directs each insurance company issuing any such policy to make payment of sums directly to Mangels. Each of them hereby appoints Mangels as its attorney-in-fact and in its or in Mangels' name to endorse any check or draft representing any such payment and to execute any proof of claim, subrogation receipt and any other document required by such insurance company as a condition to or otherwise in connection with such payment, and, upon Fabric's failure

to satisfy its Obligations to Mangels upon demand, to cancel, assign or surrender any such policies. All such sums received by Mangels shall be applied by Mangels to satisfaction of the Obligations or, to the extent that such sums represent unearned premiums in respect of any policy of insurance on the Collateral refunded by reason of cancellation, toward payment for similar insurance protecting the respective interests of Fabric and Mangels, or as otherwise required by applicable law and to the extent not so applied shall be paid over to Fabric.

8. Collections.

Each of Fabric and the Subsidiaries will immediately upon receipt of all checks, drafts, cash and other remittances in payment of any of its accounts, contract rights or general intangibles constituting part of the Collateral, or in payment for any Collateral sold, transferred, leased or otherwise disposed of, or in payment or on account of its accounts, contracts, contract rights, notes, drafts, acceptances, general, intangibles, choses in action and all other forms of obligations relating to any of the Collateral so sold, transferred or otherwise disposed of, deliver any such items to Mangels accompanied by a remittance report in form supplied or approved by Mangels, such items to be delivered to Mangels in the same form received, endorsed or otherwise assigned by Fabric or the Subsidiaries where necessary to

permit collection of items and, regardless of the form of such endorsement, each hereby waives presentment, demand, notice of dishonor, protest, notice of protest and all other notices with respect thereto. All such remittances shall be applied and credited by Mangels first to satisfaction of the Obligations or as otherwise required by applicable law, and to the extent not so credited or applied, shall be paid over to Fabric.

9. Rights and Remedies on Default.

In the event of any default by Fabric or the Subsidiaries in their performance under this Agreement or the Notes, Mangels shall at any time thereafter have the right, with or without notice to Fabric or the Subsidiaries, as to any or all of the Collateral, by any available judicial procedure, or without judicial process, to take possession of the Collateral and without liability for trespass to enter any premises where the Collateral may be located for the purpose of taking possession of or removing the Collateral, and generally, to exercise any and all rights afforded to a secured party under the Uniform Commercial Code or other applicable law. Without limiting the generality of the foregoing, each of Fabric and the Subsidiaries agrees that Mangels shall have the right to sell, lease or otherwise dispose of all or any part of the Collateral whether in its then condition or after further preparation or processing, either at public

or private sale or at any broker's board, in lots or in bulk, for cash or for credit, with or without warranties or representations, and upon such terms and conditions, all as Mangels in its sole discretion may deem advisable, and it shall have the right to purchase at any such sale; and, if any Collateral shall require rebuilding, repairing, maintenance, preparation, or is in process or other unfinished state, Mangels shall have the right, at its option, to do such rebuilding, repairing, preparation, processing or completion of manufacturing, for the purpose of putting the Collateral in such saleable or disposable form as it shall deem appropriate. At Mangels' request, Fabric and the Subsidiaries shall assemble the Collateral and make it available to Mangels at places which Mangels shall select, whether at Fabric's or the Subsidiaries' premises or elsewhere, and make available to Mangels, without rent, all of their respective premises and facilities for the purpose of Mangels' taking possession of, removing or putting the Collateral in saleable or disposable form. The proceeds of any such sale, lease or other disposition of the Collateral shall be applied first, to the expenses of retaking, holding, storing, processing and preparing for sale, selling, and the like, and to the reasonable attorneys' fees and legal expenses incurred by Mangels, and then to satisfaction of the Obligations, and to the payment of any other amounts required by applicable law, after which Mangels

shall account to Fabric for any surplus proceeds. If, upon the sale, lease or other disposition of the Collateral, the proceeds thereof are insufficient to pay all amounts to which Mangels is legally entitled, Fabric will be liable for the deficiency, together with interest thereon at the rate prescribed in the applicable Note, and the reasonable fees of any attorneys employed by Mangels to collect such deficiency. To the extent permitted by applicable law, each of Fabric and the Subsidiaries waives all claims, damages and demands against Mangels arising out of the repossession, removal, retention or sale of the Collateral.

10. Costs and Expenses.

Any and all fees, costs and expenses, of whatever kind or nature, incurred by Mangels in connection with the filing or recording of financing statements and other documents (including all taxes in connection therewith) in public offices, and any and all fees, costs and expenses of whatever kind or nature, including reasonable attorneys' fees and legal expenses incurred by Mangels in connection with the payment or discharge of any taxes, insurance premiums, encumbrances or otherwise protecting, maintaining or preserving the Collateral, or the enforcing, foreclosing, retaking, holding, storing, processing, selling or otherwise realizing upon the Collateral and Mangels'

security interest therein, whether through judicial proceedings or otherwise, or in defending or prosecuting any actions or proceedings arising out of or related to the transaction to which this Agreement relates, shall be borne and paid by Fabric on demand by Mangels and until so paid shall be added to the principal amount of the Obligations.

11. Power of Attorney.

Each of Fabric and the Subsidiaries authorizes Mangels and does hereby make, constitute and appoint Mangels, and any officer or agent of Mangels, with full power of substitution, as its true and lawful attorney-in-fact, with power, in Mangels' own name or in the name of Fabric or the Subsidiaries, to endorse any notes, checks, drafts, money orders, or other instruments of payment (including payments payable under or in respect of any policy of insurance) in respect of the Collateral that may come into possession of Mangels; to sign and endorse any invoice, freight or express bill, bill of lading, storage or warehouse receipts, drafts against debtors, assignments, verifications and notices in connection with accounts, and other documents relating to Collateral; to pay or discharge taxes, liens, security interests or other encumbrances at any time levied or placed on or threatened against the Collateral; to demand, collect, receipt for, compromise, settle and sue for monies due in respect of

the Collateral; and, generally, to do, at Mangels' option and at Fabric's expense, at any time, or from time to time, all acts and things which Mangels deems necessary to protect, preserve and realize upon the Collateral and Mangels' security interest therein in order to effect the intent of this Agreement and the Notes all as fully and effectually as Fabric and the Subsidiaries might or could do; and each of Fabric and the Subsidiaries hereby ratifies all that said attorney shall lawfully do or cause to be done by virtue hereof. This power of attorney shall be irrevocable for the term of this Agreement and thereafter as long as any of the Obligations shall be outstanding.

12. Notices.

Any notice required hereunder shall be deemed duly given if deposited in the mails, postage prepaid and sent by certified mail (i) if addressed to Mangels and Fabric, at the addresses set forth at the beginning of this Agreement; (ii) if addressed to the Subsidiaries, at Fabric's address set forth at the beginning of this Agreement; or at such other address as such party shall have specified by notice given in the same manner.

13. Other Security.

To the extent that the Obligations are now or hereafter secured by property other than the Collateral

or by the guarantee, endorsement or property of any other person, firm, corporation or other entity, then Mangels shall have the right in its sole discretion to pursue, relinquish, subordinate, modify or take any other action with respect thereto, without in any way modifying or affecting any of Mangels' rights and remedies hereunder.

14. Miscellaneous.

(a) Beyond the safe custody thereof, Mangels shall have no duty as to the collection of any Collateral in its possession or control or in the possession or control of any agent or nominee of Mangels, or any income thereon or as to the preservation of rights against prior parties or any other rights pertaining thereto.

(b) No course of dealing between Fabric and the Subsidiaries and Mangels, nor any failure to exercise, nor any delay in exercising, on the part of Mangels; any right, power or privilege hereunder or under the Basic Agreement or the Notes shall operate as a waiver thereof; nor shall any single or partial exercise of any right, power or privilege hereunder or thereunder preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

(c) All of Mangels' rights and remedies with respect to the Collateral, whether established hereby or by any other agreements, instruments or documents or by law shall be cumulative and may be exercised singularly or concurrently.

(d) The provisions of this Agreement are severable, and if any clause or provision shall be held invalid or unenforceable in whole or in part in any jurisdiction, then such invalidity or unenforceability shall affect only such clause or provision, or part thereof, in such jurisdiction and shall not in any manner affect such clause or provision in any other jurisdiction, or any other clause or provision of this Agreement in any jurisdiction.

(e) This Agreement is subject to modification only by a writing signed by the parties.

(f) The benefits and burdens of this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties.

15. Term of Agreement.

The term of this Agreement shall commence on the date hereof and this Agreement shall continue in full force and effect, and be binding upon Fabric and the Subsidiaries, until all of the Obligations have been fully paid and performed and such payment and performance has been ac-

knownedged in writing by Mangels, whereupon this Agreement shall terminate.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date first above written.

MANGEL STORES CORPORATION

By *Richard L. Johnson, V.P. Finance*

THE FABRIC TREE, INC.

By *Richard L. Johnson, President*

1. Fabric Industries, Inc.
2. Fabric Industries Rockville, Inc.
3. The Fabric Tree Beaver, Inc.
4. The Fabric Tree Beltway, Inc.
5. The Fabric Tree Chillum, Inc.
6. The Fabric Tree Cloverleaf, Inc.
7. The Fabric Tree Cortland, Inc.
8. The Fabric Tree Eastview, Inc.
9. The Fabric Tree Echelon, Inc.
10. The Fabric Tree Fairfax, Inc.
11. The Fabric Tree Frederick, Inc.
12. The Fabric Tree Harrisburg, Inc.
13. The Fabric Tree New Jersey, Inc.
14. The Fabric Tree North Dartmouth, Inc.

5. The Fabric Tree of Concord, Inc.
6. The Fabric Tree of Dedham, Inc.
7. The Fabric Tree of Franklin, Inc.
8. The Fabric Tree of Nanuet, Inc.
9. The Fabric Tree of Port Chester, Inc.
10. The Fabric Tree of Shop City, Inc.
11. The Fabric Tree of Smith Haven, Inc.
12. The Fabric Tree of Watertown, Inc.
13. The Fabric Tree of York, Inc.
14. The Fabric Tree Orange Plaza, Inc.
15. The Fabric Tree Park City, Inc.
16. The Fabric Tree Pleasantville, Inc.
17. The Fabric Tree Princeton, Inc.
18. The Fabric Tree Rockville, Inc.
19. The Fabric Tree Shoppingtown, Inc.
20. The Fabric Tree Springfield, Inc.
21. The Fabric Tree Stamford, Inc.
22. The Fabric Tree Tri-County, Inc.
23. The Fabric Tree Woodbridge, Inc.

By Richard E. Edelman
President
of the Corporations listed above
numbered 1 through 33.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 4 day of May, 1976, before me personally came Matthew H. Krieger, to me known, who being by me duly sworn, did depose and say that he resides at 349 Deane Ave. S.E. N.Y.; that he is the V.P. Finance of MANGEL STORES CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.



SIMON B. POSNER
Notary Public, State of New York
No. 31-6001611, Exp. in N. Y. Co.
Commission Expires March 20, 1978

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 3rd day of May, 1976, before me personally came Richard E. Kren, to me known, who being by me duly sworn, did depose and say that he resides at 10 Ocean Court, Eltham, N.Y.; that he is the President of THE FABRIC TREE, INC. and all its subsidiaries, the corporations described in and which executed the foregoing instrument; that he knows the seal of said corporations; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporations, and that he signed his name thereto by like order.



SIMON B. POSNER
Notary Public, State of New York
No. 31-6001611, Exp. in N. Y. Co.
Commission Expires March 20, 1978

SCHEDULE I

TO

LOAN AND SECURITY AGREEMENT DATED 11 / , 1976

All personal property and trade fixtures of Fabric and the Subsidiaries, whether now or hereafter existing or now owned or hereafter acquired and wherever located, of every kind and description, tangible or intangible, including, without limitation, all stock of the Subsidiaries, all cash, goods, equipment, inventory, accounts, chattel paper, general intangibles, credits, claims, demands and any other property, rights and interests of Fabric and the Subsidiaries, including, without limitation, all of their properties and assets, if any, specifically listed on this Schedule I, and any and all additions and accessions thereto, all substitutions and replacements therefor and all products and proceeds thereof or proceeds of insurance thereon.

SCHEDULE II

TO

LOAN AND SECURITY AGREEMENT DATED 1st, 1976

<u>Name</u>	<u>State Of Incorporation</u>	<u>States In Which Qualified</u>
Fabric Tree, Inc.	New York	Connecticut Maryland New Jersey Pennsylvania Rhode Island Virginia
Fabric Industries, Inc.	Connecticut	
Fabric Industries Rockville, Inc.	Maryland	
Fabric Tree Beaver, Inc.	Pennsylvania	
Fabric Tree Beltway, Inc.	Maryland	
Fabric Tree Chillum, Inc.	Maryland	
Fabric Tree Cloverleaf, Inc.	Delaware	Virginia
Fabric Tree Cortland, Inc.	New York	
Fabric Tree Eastview, Inc.	New York	
Fabric Tree Echelon, Inc.	New Jersey	
Fabric Tree Fairfax, Inc.	Delaware	Virginia
Fabric Tree Frederick, Inc.	Maryland	
Fabric Tree Harrisburg, Inc.	Pennsylvania	
Fabric Tree New Jersey, Inc.	New Jersey	
Fabric Tree North Dartmouth, Inc.	Massachusetts	
Fabric Tree of Concord, Inc.	Delaware	
Fabric Tree of Dedham, Inc.	Massachusetts	
Fabric Tree of Franklin, Inc.	Pennsylvania	
Fabric Tree of Nanuet, Inc.	New York	
Fabric Tree of Port Chester, Inc.	New York	

EDULE II - Page 2.

<u>Name</u>	<u>State of Incorporation</u>	<u>States In Which Qualified</u>
e Fabric Tree of Shop City, Inc.	New York	
e Fabric Tree of Smith Haven, Inc.	New York	
e Fabric Tree of Watertown, Inc.	New York	
e Fabric Tree of York, Inc.	Pennsylvania	
e Fabric Tree Orange Plaza, Inc.	New York	
e Fabric Tree Park City, Inc.	Pennsylvania	
e Fabric Tree Pleasantville, Inc.	New Jersey	
e Fabric Tree Princeton, Inc.	New Jersey	
e Fabric Tree Rockville, Inc.	Maryland	
e Fabric Tree Shoppingtown, Inc.	New York	
e Fabric Tree Springfield, Inc.	Delaware	Virginia
e Fabric Tree Stamford, Inc.	Connecticut	
e Fabric Tree Tri-County, Inc.	New York	
e Fabric Tree Woodbridge, Inc.	New Jersey	

EXHIBIT A

\$ _____

New York, N.Y.
, 1976

FOR VALUE RECEIVED, The Fabric Tree, Inc., a New York corporation whose address is 18 East 41st Street, New York, New York, hereby promises to pay to the order of Mangel Stores Corporation, a Delaware corporation, at its offices at 5611 Tonnelle Avenue, North Bergen, New Jersey, or at such other place as the holder of this note may specify, the principal sum of

(\$) Dollars on demand, with interest at % per annum.

To secure payment of this note, the maker has granted certain collateral more fully described in a loan and security agreement dated 1976. Presentment, demand and notice of dishonor are expressly waived.

The holder of this note shall not be required to resort to any of the aforesaid collateral for payment but may proceed against the maker in such manner as the holder chooses. None of the holder's rights or remedies shall be waived or diminished by any failure or delay in the exercise thereof, and all such rights and remedies shall be cumulative, and may be exercised in whatever manner and order the holder chooses.

THE FABRIC TREE, INC.

By _____

Richard Echikson
President

Court's Exhibit I

al Store Corporation's demand
for funds pursuant to the Loan Agreement [LOST]

On July 27, 1976, during hearings before
Bankruptcy Judge Stanley T. Lesser,
Mangel Stores Corp. presented to
The Fabric Tree, Inc. a handwritten demand for
immediate repayment of all loans made by
Mangel Stores Corporation to The Fabric Tree, Inc.,
pursuant to the terms of a Loan and
Security Agreement dated May 4, 1976

Transcript of Oral Opinion
of Bankruptcy Judge Stanley T. Lesser,
dated July 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

M ~

In the Matter
of

FABRIC TREE

Debtor

No. 75 B 1383

U.S. Courthouse
Foley Square
New York, New York

July 30, 1976

Adjourned Confirmation

B E F O R E:

HON. STANLEY T. LESSER,

Bankruptcy Judge

RAYVID REPORTING SERVICE
CERTIFIED STENOGRAPHIC REPORTERS
150 NASSAU STREET
NEW YORK, N. Y. 10038
CORILAND 7-3877
3878

A P P E A R A N C E S:

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BY: MYRON TREPPER, Esq., of Counsel.

COLE & DIETZ, ESQS.,
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40 Wall Street
New York, New York

BY: ROBERT J. ROSENBERG, Esq., of Counsel.

HAHN, HESSEN, MARGOLIS & RYAN, ESQS.,
Attorneys for Creditors Committee,
350 Fifth Avenue
New York, New York

BY: WILLIAM FABRIZIO, Esq., of Counsel.

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THE JUDGE: It is apparent to me
that I am not going to complete any kind of
a formal opinion in time to give you this
afternoon.

However, I have decided what I
will do in the case. I think I ought to
convey it to you in some short summary of
the reasons and I may well commit all of
this to writing over the weekend so at
least you will understand the factual

Fabric

basis.

To the extent that there are authorities involved we are dealing basically with principles rather than precedents.

It seems to me, that to the extent that you are apprised of the principles that we are relying upon, it should be adequate to enable you to prepare whatever steps you want to take by way of appeal.

I would like to say that whatever we are doing here is without the benefit of the stenographic transcripts, both of the July 15th hearing and of the July 27th hearing and, of course, there were no transcripts of any of the informal discussions that took place on the 15th of July.

We have tried to do the best we could with our recollection and notes.

To the extent that anything that we do is in reliance on a misconception over what transpired there will have to be an adjustment.

Fabric

As we view it, on July 15, 1976, at the adjourned hearing on confirmation of Fabric Tree, Mangels objected to the court's consideration of confirmation because it contended that confirmation could not be effectuated within the \$600,000 amount theretofore deposited with the creditors committee.

I guess that was on May 4, 1976.

Thereby, in effect, making unavailable the fund needed for the confirmation deposit under Section 362 of the Bankruptcy Act.

At the heart of Mangels objection, as I understood it, was a letter agreement pertaining to the \$600,000 deposit undated but apparently executed on or about May 4, 1976 between Mangels and the creditors committee which was ultimately introduced as Debtor's Exhibit 3 at the hearing on July 27th.

Mangels contended that the letter agreement conditioned the release of the

Fabric

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3 funds to the court appointed disbursing
4 agent on no more than \$600,000 being required
5 to effectuate confirmation including payment
6 in full of all priority claims and expenses
7 of administration in the Chapter XI pro-
8 ceeding including the charges to the salary
9 and expense fund.

10 The \$600,000 figure was broken
11 down \$450,000 for a five percent cash
12 dividend to a maximum of \$3 million of
13 unsecured indebtedness and \$150,000 to pay
14 in full the aforesaid priority and ad-
15 ministration expenses.

16 Mangels further contended at
17 that time that at least \$125,000, and it
18 may have been higher, in excess of the
19 \$150,000 would be required to pay priority
20 and administration expenses rendering the
21 release of the fund and confirmation
22 impossible.

23 As I recall, Mangels was adamant
24 in insisting that there should be charged
25 against the \$150,000 amount in addition

Fabric

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3 to the fees that we had allowed to the
4 extent of approximately \$92,000 prefiling
5 priority tax claims which were approxi-
6 mately \$42,000 and the salary and expense
7 fund in the magnitude of \$508,000.

8 All unpaid administration
9 expenses with respect to the day to day
10 operation, notwithstanding that the debtor
11 had adequate cash to pay the same, and
12 also previously outstanding administration
13 expenses had been paid by the debtor
14 after Mangels had begun financing the
15 debtor early in May of 1976.

16 Due to the magnitude of these
17 items the offer that was made by counsel
18 to the debtor to get waivers by the
19 professionals fees or other adjustments
20 if necessary to bring the figure down to
21 \$150,000 was unavailing since the numbers
22 by themselves together with the priority
23 claims more than consumed the \$150,000.

24 Mangels refused, as I viewed it,
25 to concede that the latter agreement with

Fabric

the creditors committee could be interpreted otherwise than to include all of these amounts in the \$150,000.

As I recall they absolutely refused to hear any counter-argument on the subject and threatened to hold the creditors committee liable if any portion of the \$600,000 was disbursed or if the certificate of deposit was turned over to the disbursing agent.

It is not clear to me whether, or for that matter, when the debtor and its counsel were aware tha Mangels would take the position at the July 15th hearing that was outlined before.

It is clear, however, that neither the court nor the creditors committee had any prior notice or any inkling that Mangels' position at the hearing on the 15th would be to the effect that confirmation could not proceed because of the excess of administrative expenses.

There is no question in my mind

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that Mangels had ample opportunity to apprise the creditors committee or the court or both of that state of facts, certainly as late as July 13, 1976 when the court announced its determination of the fees to be allowed to the professionals and set the morning of July 15th as the adjourned date for confirmation.

Mangels was represented, as I recall, in the courtroom, if not at the counsel table in the courtroom as they had been at various stages of the proceedings prior to that time. They said nothing.

Counsel for the debtor, as I recall, thanked the court for acting promptly on the application for the allowance.

The statement was made that the amounts fixed were well within the budgets for confirmation. The remarks to the court made it clear that the court was proceeding on the assumption that the

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3 confirmation would proceed on the 15th
4 without any difficulty and delay.

5 I view that the representatives
6 of Mangels in sitting silent and saying
7 nothing to tell the court or the creditors
8 committee of various facts, and circumstances
9 was conduct that was not called for.

10 Specifically I have determined that
11 by the 13th of July and probably substantially
12 prior thereto Mangels had decided that it
13 no longer favored the acquisition of Fabric
14 Tree.

15 Also that while Mangels might
16 live up to its bargain it would compel it
17 to do so and would use every means available
18 to get out of the deal.

19 Also that Mangels believed or
20 intended to assert that the funds needed
21 for confirmation were not available because
22 of the unrepaid administration expenses
23 referred to above.

24 Finally, that Mangels considered
25 the July 15, 1976 confirmation condition as

Fabric

one where time was of the essence and thereby put everyone on notice that Mangels would consider its obligation to conclude the transaction over at the stroke of midnight on the evening of July 15th.

I feel that if Mangels had made all of that clear to the creditors committee and possibly the court, we would not be in the situation where, for the first time on the morning of confirmation with no advance notice a bombshell was dropped into the middle of the proceedings.

Whether or not our ultimate view here would have been to the contrary, I don't know.

Clearly it seems to me that there was an affirmative obligation to have given some notice to other people that there was a problem in the confirmation procedure.

It also seems to me, that based upon the heated disagreement that arose on the morning of the 15th, it was

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impossible to go forward with the matter
at that time.

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As I recall it was adjourned to
the afternoon and in the afternoon after
it became apparent that no final deter-
mination could be made without possibly
taking testimony or giving the creditors
committee an opportunity to meet the
matter, as I recall, was adjourned to
July 27th in the morning.

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There was discussion about
trying to reconcile whatever differences
existed and also, I think, there was
some assurances which apparently have
been performed and complied with by the
management of Mangels that they would
pretty much maintain the status quo in
terms of the operating support for Fabric
Tree.

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After it was reported on July 27th
that all of the positions remained un-
changed, the court ordered an evidentiary
hearing that afternoon to permit additional

Fabric

evidence to be taken on the questions that we have to deal with now.

In the first instance, I must reject the argument of Mangels that the Bankruptcy Court is without jurisdiction to determine the controversy at hand.

As I understand the Mangels memorandum on the subject it attempts to treat this as a case to determine title to property not in the possession of a debtor where the claim of a third party not otherwise before the court is more than merely colorable.

I would agree with the proposition of law. I don't agree with respect to the application as to the facts in the case.

As I view the situation here one or more of at least three separate grounds exist to support jurisdiction in the court.

The first is that the role of Mangels and Mangels participation, as I

Fabric

view it in this proceeding, constitutes, either that Mangels is a party to the proceeding or one who has consented to the jurisdiction of the court.

In the second place, I feel that Mangels is involved in a dispute that is so integral and vital to the proceedings that to deny the jurisdiction of the bankruptcy to determine the meetings and performance of the May 4, 1976 letter agreements is basically to emasculate the ability of the Bankruptcy Court to supervise the confirmation process in a Chapter XI proceeding.

Finally, although I am not relying upon it, it seems to me that the deposit of \$600,000 certificate of deposit with the creditors committee in its official capacity and with the circumstances of this case place that fund virtually under the control of the court, and certainly bring its ultimate disposition within the jurisdiction of the court for

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the purposes of determining whether the conditions of its use in the confirmation process is complete or have been met.

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I am not going to spend a great deal of time on the factual basis of that.

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I want you to understand that I am heavily influenced by the fact that we had a situation here where Mangels apparently sought out the debtor or its counsel and insinuated itself into this proceeding as a potential funder of a plan of arrangement and purchaser of the shares of Fabric Tree.

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One has to look to the two agreements that were submitted at the hearing in the 27th, the loan and security agreement, which was Mangels Exhibit 1, which states in the second whereas clause: "That Mangels intends to provide funds to Fabric to confirm a plan of arrangement in proceedings and in connection therewith has contracted to purchase all of the outstanding common stock of Fabric."

Fabric

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3 In the purchase and sale agree-
4 ment to which the debtor was not a party,
5 namely a stock purchase agreement between
6 Mangels and the two stockholders of the
7 debtor, both of whom were the principal
8 operating officers and both of whom looked
9 forward; number one, to employment arrange-
10 ments with Mangels after the consummation
11 of the transaction, and secondly, to the
12 possibility of an additional benefit
13 through an earn out provision on future
14 operations.

15 The key thing in setting the
16 background here is the third whereas clause
17 on the front page of that agreement which
18 states: "Whereas Mangels intends to make
19 an offer to the creditor in such proceeding;
20 namely the ones herein to advance loans or
21 contribute to Fabric an amount sufficient
22 to pay general unsecured creditors in the
23 proceedings fifteen percent of their claims
24 up to a maximum of \$450,000 in cash upon
25 confirmation plus administrative expenses

Fabric

and priority claims up to a maximum of \$150,000."

Those two agreements, even though they were never submitted to the court, certainly demonstrate the background against which the parties were operating.

Mangels to a certain extent was to come in here and control the confirmation process, although they never sat at the counsel table their presence was constantly brought to the attention of the court.

The court was mindful that they were in the situation. The court to a certain extent relied upon the fact that they were totally familiar with Chapter XI procedures having only recently been confirmed in this court, I guess in October or November of 1975.

There were no storm warnings here until the 15th of July. It seemed to me that everything was proceeding apace and the court was relying upon the fact

Fabric

that the deal was going through.

In consequence of that we approved, in effect the dismissal of a third party investor that had advanced funds.

We approved sweeping security agreements under which there was authority to turn the control of Fabric Tree over to Mangels.

We find out afterwards that the operating officers of Fabric Tree moved in with Mangels.

We find that it was impossible for Fabric Tree to acquire inventory without either the funding being supplied by Mangels or Mangels arranging for the credit.

We find that conveyance of that to the court from time to time at the XI-4 hearings with the full knowledge and consent, and I might say, with the acquiescence of Mangels through its presence in the courtroom on various occasions convinced us that it would be totally improper to

Fabric

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3 permit Mangels to say that they never had
4 any part in this proceedings.

5 Their presence was here. We felt
6 it. We saw it. We were told about it.

7 If they wanted to disabuse us
8 of that they certainly should have done so.

9 The second point is self-evident
10 having embroiled itself in the confirmation
11 process here, it seems to me that Mangels
12 could not when the proceedings seemed to be
13 going contrary to its liking say that the
14 court has no jurisdiction.

15 It is akin to the story of the
16 young boy who goes to the playground with
17 his basketball and gets into the game with
18 the other kids and doesn't like what is
19 going on and says, "Give me my ball. I'm
20 going home."

21 It seems to be that this is
22 what Mangels was attempting to do here.
23 It seems to me that having involved the aid
24 and assistance of the court here to pur-
25 chase Fabric Tree they can't at the last

Fabric

moment say, "No jurisdiction."

I don't recall any question with respect to the jurisdiction of the court in connection with the outset of the 15th of July hearing when Mangels got up and voiced its objection.

It seems to me that what Mangels said afterwards that when the court implied that it itself might have the power to adjudicate the question with respect to the creditors committee, then the question was raised for the first time.

In any event, I don't think that is that significant because I think Mangels was in the ring by that time for the purpose of dealing with confirmation.

The last point on jurisdiction has to do with the technical argument about where the funds are and under whose custody they are, et cetera.

It seems to me that if there is sufficient nexus to the court and to the jurisdiction of the court in terms of the

Fabric

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3 deposit with the committee particularly
4 with respect to the changes in the rules
5 and statutes that permit deposit with
6 committees or with other persons, and I
7 think there is something in the notes to
8 the commentators that this was done to
9 enhance the confirmation process.

10 If that was contemplated within
11 the official scheme of the facts, it seems
12 to be another thing that brings the contro-
13 versy to the court.

14 With respect to the real merits
15 which is a difficult thing to do because
16 we have before us what I consider to be
17 the May 4, 1976 letter with the committee
18 to the extent that that was intended as
19 an operative document for the funding of
20 the plan.

21 As I understand it, Mangels
22 now relies, not on the objection advanced
23 at the July 15th confirmation hearing con-
24 cerning the extent of administration expense
25 that ought to be borne out of the \$150,000,

Fabric

but on the fact that the order of confirmation was not entered on July 15th thus resulting in non-performance which is alleged to be a condition precedent as the agreement says in numbered paragraph one: "Entry of an order by the Bankruptcy Court" et cetera, et cetera.

Repeating -- "\$450,000 for unsecured claims and the \$150,000 for all priority and administration expenses as previously referred to."

In order to sustain this position, as I view the case, Mangels must show several things: They must show that time was of the essence so that the July 15, 1976 condition would be strictly enforceable; secondly, I think they must show that the performance of the condition has not been waived; thirdly, I think they must show that performance of the condition has not been prevented or hindered to such an extent as to render inequitable to enforce it for Mangels benefit or related or in

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3 the alternative that Mangels is not other-
4 wise estopped to rely upon the non-
5 performance of the condition requiring the
6 confirmation by July 15th.
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8 As to the first matter I have
9 concluded that time was not strictly of
10 the essence in the performance of the
11 condition that an order of confirmation
12 be entered on or before July 15, 1976.

13 Based upon the testimony and the
14 statements of counsel directly involved in
15 various conferences, I find that the purpose
16 of the July 15th date when formulated was
17 two-fold.

18 First, to fix a deadline in the mind
19 of the creditors thereby galvanizing the
20 creditors committee into action to procure
21 requisite acceptance at an early date.

22 The second is somewhat related to
23 the first, which is to give Mangels warning
24 in the ability to protect itself at an early
25 date as practicable if confirmation was not
forthcoming.

Fabric

I stress the last point "Confirmation was not forthcoming." Based upon the testimony of Mr. Hoffman and others, it is obvious to me that under the business plan adopted it was necessary for Mangels to have already made the peak commitments for inventory, major portion of that commitment would have been received and Fabric Tree would have still been in the red based upon the projection.

No clearcut decision would be received from the landlords as to whether or not stores desired by Mangels to be converted to ready-to-wear would have been capable of getting landlord approval.

I can mention other things, but it seems to me that the principal thing is that in terms of the business while the season was critical the specific date was not.

So long as Mangels was not facing a situation where there was not confirmation, then the delay of a few days is not

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to me, and I don't think was considered at
the time that the condition was imposed,
material.

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So long as confirmation occurred
within a reasonable time after July 15th
I think that Mangels would have received
the full value of its bargain without
prejudice.

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There is no doubt that by July
15th Mangels should have known that confirma-
tion was not in jeopardy.

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The plan had been accepted by the
creditors and the court showed a willingness
to confirm. There had been a conveyance
of the information that reasonable overages,
if any, in the general claims or administra-
tion claims would be labeled by waivers or
reductions by the members of the committees
and professionals; whether the paper work
took a few days extra was immaterial to
the parties since Mangels already had the
power to control the business of Fabric
Tree.

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4 The executives of the debtor, as
5 previously mentioned, were looking forward
6 to become employees of Mangels and the
7 benefits of the earn out as provided in the
8 contract of sale was an inducement to them
9 to see to it that nothing interfered with
10 confirmation.

11 Also there was no chance that
12 the deposit that had been made with the
13 committee could somehow be dissipated
14 since the certificate of deposit was not
15 due until September 2nd.

16 Everyone knew that even if the
17 confirmation took place on the 15th of
18 July there was no possibility of a distribu-
19 tion until the date of maturity. There
20 was no detriment suffered with respect to
21 the C.D. because the deposit agreement
22 showed that interest would be paid to
23 Mangels on September 2nd.

24 If the amount needed for con-
25 firmation was less than \$600,000 the
overage would be repaid to Mangels.

Fabric

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3 Going on to the next point, even
4 if I were to have held that time was of the
5 essence in connection with the conditions
6 stated in the creditors committee-Mangels
7 letter I am convinced that the ultimate
8 result here would be the same in the light
9 of my views and the enforceability of the
10 condition under the circumstances here; how-
11 ever to make the record clear, I find no
12 facts whatsoever in the record that are
13 adequate to support a holding that Mangels
14 waived performance of the July 15th 1976
15 condition.

16 On the other hand, I conclude
17 that Mangels conduct hindered the per-
18 formance of the condition so as to permit
19 at this juncture a reasonable delay in its
20 accomplishment on the part of Fabric Tree.

21 I also feel that Mangels had
22 faith, and to a certain extent lack of
23 candor otherwise estops it upon relying
24 on the absence of a confirmation order on
25 July 15, 1976.

Fabric

There are various facts that I believe exist in reaching those conclusions in which I have relied upon in determining the issue against Mangels.

First and foremost is the issue that leads me to conclude that no later than the latter part of June or certainly the early part of July the management of Mangels had determined that it was not interested any longer in purchasing Fabric Tree and the acquisition would be inimical with respect to the best interests of Mangels.

I also infer that Mangels determined that it would get out of the Fabric Tree transaction in any way possible and it was apparently confident that it could do so in as much as sometime early in July for no apparent reasons that I have been shown.

It started to communicate with suppliers cancelling guaranties, giving instructions that it would not be responsible

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3 for bills on inventory, and in effect
4 undertaking conduct which is totally in-
5 consistent in my mind for the carrying out
6 of the business plan that had been enunci-
7 ated by Mr. Hoffman.

8 I find nothing wrong in a company
9 changing its mind about a deal. There is
10 nothing immoral about that. There is
11 nothing unusual about that. It seems to
12 me that the conduct of that company, once
13 the decision is made is significant.

14 In this case, since we are
15 dealing with a transaction that was being
16 effected, whatever anybody wants to say
17 under the aegis and through the officers
18 of the Bankruptcy Court, I think that a
19 standard of conduct significantly greater
20 than something that might get by in the
21 morals of the marketplace was required
22 of Mangels.

23 I don't say that they are held
24 to whatever Justice Cardoza words with
25 respect to the punctility of honor among

Fabric

partners here.

Number one, they should have apprised the creditors committee. They should have apprised the court. If it was their intention to change the business operation through the cutting off of inventory, I think the court should have been apprised of it because it was a significant change in the ultimate value of the debtor and the ultimate ability of the debtor to exist if somehow the Mangels deal did not go through.

It also seems to me that there was an affirmative obligation if there was any intention to rely on the July 15th condition to make that crystal clear to everyone.

I realize that there was testimony with respect to remarks said to counsel for the debtor during some meetings in the latter part of June.

I don't find anything conclusive about them. I don't find that the conveying

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3 of any of that information to which Mr.
4 Lamm testified to, to the debtor's counsel in a
5 way satisfied that obligation to make that
6 point clear to the committee or to the court.
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8 The condition that is being relied
9 on now is in the condition in the agreement
10 between Mangels and the creditors committee.

11 It seems to me that some communica-
12 tion to them was in order.

13 With respect to another aspect of
14 this case which is significant to me is
15 that I find that the objections raised by
16 Mangels on the 15th of July in opposition
17 to the satisfaction of the \$150,000 provi-
18 sion were not well taken, and in my view
19 were not in good faith.

20 I am not moralizing about this.
21 I am merely saying what I think was re-
22 quired and not required. Based upon my
23 view as to the Mangels decision to try
24 and get out of the deal, I think those
25 objections were raised primarily for the
point of thwarting confirmation.

Fabric

As I understood it the principal contention was that funds that had been used in the day to day operation by Fabric Tree should not have been used for that purpose and were contrary to the terms of the commitments.

The record is abundantly clear that whatever right Mangels had to require the deposit of money received from sales with Mangels with the refunneling of that money to Fabric Tree for its day to day operation was certainly waived or not insisted on.

I see no great difference between Fabric Tree having turned the money over to Mangels in the first place and Mangels having given it back to them for purposes other than for the purchase of inventory.

Since the personnel were under the same roof after a point, and Mangels had the full right to insist upon everything, I cannot in any way find that the failure to turn that money in was any kind of a

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violation that bears upon this subject.

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The language of the letter to the creditors committee, and I really find only one place where there is language in it that does not refer to heretofore previously referred to, is in the first paragraph.

In talking about the \$600,000 it talks about "No more than \$600,000 shall be required to effectuate confirmation" including payment of this, that and the other thing.

When it says "Including payment in full of all priority claims" et cetera, et cetera. It seems to be that language means the priority claims unpaid at the time of confirmation.

The argument, as I understood it, that Fabric Tree did not have the authority to use the daily generated fund to pay the administration expense in the form of daily operating expense was totally without merit.

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3 Even Mr. Lamm on the stand in
4 response to the questions of Mr. Grames as
5 to the derivation of the \$150,000 while re-
6 fusing to accept Mr. Grames suggestion that
7 it was \$100,000 for professional fees, did
8 himself admit that the only thing that he
9 understood would be included in the admini-
10 stration claim was past due expense in
11 the Chapter proceeding at the time that
12 Mangels started to finance the operation
13 early in May.

14 The position advanced by counsel
15 on the 15th went far beyond that. As far
16 as I was concerned the argument that funds
17 in the possession of the debtor generated
18 in the Chapter proceeding could not be used
19 to pay current operating expense.

20 It was unreasonable and certainly
21 not called for by the agreement with the
22 creditors committee.

23 Based upon the practice in
24 bankruptcy it seems to me that the only
25 funds to be deposited on confirmation go

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Fabric

for unpaid priority and administration
expense at that time.

For that matter there often are
situations where administration expenses
that had been incurred and are not due are
not deposited unless subject to some kind of
executive affidavit concerning the fact that
they will be paid.

That being the case, I find that
the position taken by Mangels on the morning
of what was supposed to be the day of con-
firmation, which I think, had a substantial
impact and resulted in counsel for the
debtor not pressing for confirmation on that
date because of the strong positions that had
been taken and the statements about personal
liability, et cetera, that had been made
by Mangels.

Alternatively, if Mangels had
a problem with the \$450,000 and the \$150,000,
it seems to me that it would have been
better to have stayed silent, raised no
question and give the debtor a fair

Fabric

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3 opportunity to see whether it could have,
4 in fact, confirmed with the \$600,000.

5 Because of that I find that the
6 failure to confirm on the 15th is merely a
7 continuation of the objection that was
8 raised on the 15th of July. Until these
9 issues are settled in full I don't see how
10 Mangels is in a position to avail itself
11 of the failure to perform the condition.

12 I don't find that this delay is
13 so burdensome on Mangels to be inequitable
14 to hold them to the condition.

15 In part, on that while I recognize
16 the statements made by Mr. Hoffman concerning
17 the loss in the season, this, that and the
18 other thing, it seems to me that Mangels
19 had already embarked upon a course of
20 conduct early in July which would have
21 brought about the same fact in that they
22 cancelled orders, et cetera.

23 Whatever delay is inherent now is
24 pretty much of Mangels own making, and I
25 don't think they can take advantage of it.

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I could go on to amplify the facts but I will not at this time. The problem I have is where all of this brings us.

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I think where it brings us basically is that I am prepared to make a determination that the failure to comply with the condition about confirmation on or before July 15, 1976 does not at this juncture preclude the creditors committee from turning over the certificate of deposit to the disbursing agent in the event that a proper order of confirmation is entered in a reasonable period of time that will permit confirmation to be effectuated with a maximum of \$600,000.

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In making this latter determination I specifically find that there is no obligation to repay Mangels in addition or to add onto the administration expense amounts that may have been paid during the course of the administration.

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Insofar as there are other debts, some of which were testified to, and I must admit that the evidence as I recall it, was

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3 somewhat inconclusive, particularly in
4 respect of this item that Mr. Felmer
5 testified to with respect to taxes, a sum
6 which might have been in one category and
7 some in another.

8 The proof of the pudding is in the
9 eating and I mean by the confirmation schedules
10 and the various attestations that must go
11 along with them. To the extent that there
12 are funds that would otherwise be used by
13 the debtor to pay the operating expenses
14 and thereby reduce the amounts that are
15 subject to deposit on confirmation, I think
16 that those expenses that can and would have
17 been paid by the debtor or that are paid
18 by the debtor in accordance with what could
19 be considered reasonable or normal practice
20 need not be provided for again.

21 In terms of what is a reasonable
22 period of time in which to permit the con-
23 firmation process to proceed I feel no
24 different than I stated before. It seems
25 to me that with the posture of the case as

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3 it existed on the 13th, 14th and 15th of
4 July, confirmation should have taken place
5 within a period of a few days.

6 That being the case it seems
7 to me that confirmation now, if it is not
8 possible today which it is not, and I don't
9 know what the paper situation is, should be
10 concluded by the close of business on the 4th
11 of August which is Wednesday of next week.

12 That gives you three full business
13 days.

14 In the event that is not done,
15 unless by reason of further interference
16 by the Mangels, it would seem to me that
17 reasonable opportunity to satisfy the pur-
18 pose and intent of the July 15th condition
19 has been given and has failed.

20 It is apparent to me that this
21 is an extremely unusual situation. There
22 are unusual aspects involved here for which
23 there is no time to comment on. Whether
24 there is any lesson to be learned in this
25 in the future by the court, by people who

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serve as counsel for the debtors, by people

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who serve for counsel to the creditors

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committee or by people who serve as third

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party acquirers who want to feed at the

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trough of the bankruptcy court's door re-

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mains to be seen.

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I have a feeling that all of this

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was taken in some respects and in some

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quarters in too cavalier a fashion and

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that more attention should have been paid to

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the fact that what was going on with respect

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to the transfer of the ownership by Fabric

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Tree and Mangels and the settlement of

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Fabric Tree's obligation to the pre-

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filing creditors Fabric Tree was in the

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context of a judicial proceeding before

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the Bankruptcy Court.

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In terms of statements of legal

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authorities, I will not undertake to give

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any great discussion.

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On the jurisdictional aspect

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of it, basically what I am saying is, that

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the inherent equitable power of the

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3 Bankruptcy Court on the case that spoke
4 of it, and the administration of the act
5 and the things that are so closely related
6 bankruptcy, as must be decided here,
7 at authority and we can find all kinds of
8 citations.

9 Basically we have found none
10 strictly on point and see none in the
11 briefs submitted. That is, strictly on
12 point.

13 I don't want to start citing
14 language in Louisiana cases that speak of
15 the extra areas in which the Bankruptcy
16 Court can function other than pertain
17 directly to the property of the debtor.

18 If it is necessary to do so we
19 will, or we will get a memorandum during
20 my absence where my able assistants can
21 help me in terms of contractual questions,
22 everybody has cited Williston, although
23 different sessions; everyone has read
24 Corbin; everyone has looked at various
25 citations.

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Basically, I am not in agreement with the assertion that time is of the essence in every contract unless clearly indicated to the contrary.

It seems to me that I would go with what I think is the weight of authority that says that the determination of whether time is of the essence in a contract or the condition goes to the circumstance and as to the intent of the parties.

I think what I have stated here with respect to the facts indicates the reasons for my holding on that point.

In terms of the question of interference we have found two cases which have some bearing on this. We mention them only because they seem to enunciate principles which were agreeable. One is the case of Gulf Oil Corporation versus American Louisiana Pipeline Co. 282 Fed. Second 401 Sixth Circuit 1960.

Basically what happened in that case is Gulf Oil was precluded from insisting

Fabric

on the effect of a condition that the approval of an administration agency be obtained for the certain gas lease within a six-month period because the court found that in the application filed with the commission raised certain questions which were bound to delay the proceeding and which had been previously raised and put to rest and never should have been inserted in the application.

We find also a case which is somewhat vaguely related to this in respect of the time of the essence point which is Hayes Manufacturing Corporation versus McCalley, 140 Fed. Second., 186, which is a Sixth Circuit case, where the court said that it would not enforce as time being of the essence a specific condition that shares be issued in an acquisition situation be listed on the New York Stock Exchange by a certain date was conclusive and they remanded to the lower court for further proceedings, a case where the lower

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court had dismissed the complaint merely on the fact on the strength that the shares were not issued.

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There are other factors. But the court is convinced that it is the responsibility of the trier of the facts to see what the performance or non-performance of the condition was.

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I don't know where this leaves you Gentlemen. I don't know whether we should enter an order.

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Basically I have attempted to construe the meaning and effect of the agreement between Mangels and the creditors committee, and also that I see no reason why Mangels at this time permit them to refuse or to refuse to permit the creditors committee to turn the deposit if there is a valid confirmation order.

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With respect to any appeal that anyone wants to take here, I would be willing to entertain some kind of an application. I do want to add apropos that, that in terms

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3 of the injury likely to be suffered here
4 I do believe that it has been greatly
5 diminished by the willingness of Mangels
6 to undertake to hopefully preserve the
7 status quo.

8 I don't know how long that can
9 go on. I don't know what effect Mangels
10 management or what effect this decision
11 will have on Mangels management in moving
12 forward with that.

13 What do you want to do?

14 MR. ROSENBERG: Your Honor, I
15 would strongly object to the entry of any
16 kind of order at this time.

17 We appeared before you on, I
18 believe Tuesday, to give what we thought
19 was to be a status report to you. If you
20 recall at the time of the July 15th hearing
21 and meetings Mangels agreed to make a good
22 faith look see after thirty days and would
23 continue to finance during that period on
24 the assumption that the debtor entered into
25 a stipulation, which it has not, by the way.

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3 You were asked if you wanted to
4 carry the matter for thirty days and you
5 said you preferred a date early set aside
6 for a status report purpose.

7 That was the purpose of the hearing
8 on Tuesday.

9 At that hearing you presented a
10 series of questions that you stated you
11 wanted an evidentiary hearing respecting.
12 We agreed to participate in that hearing
13 although objected to the jurisdiction of
14 this court to the extent that the elements
15 raised by the hearing went to the inter-
16 pretation of an agreement to which we
17 argued that you have no jurisdiction.

18 My point is this: We did not
19 come prepared for a trial and adjudication
20 finally of the merit of this controversy.
21 Trials of that kind should be conducted
22 upon papers, complaints, answers, dis-
23 covery, time to prepare.

24 It was our understanding that
25 we were participating in a hearing to give

Fabric

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3 you answers to questions which you wanted
4 and perhaps were entitled to.

5 I would object based upon due
6 process grounds. We did not have a fair
7 trial if the purpose was an ultimate
8 adjudication of the issues.

9 THE JUDGE: As I view the situa-
10 tion the entire course of events was
11 triggered by the objection raised by Mangels
12 on the morning of the 15th to the court
13 proceeding to consider confirmation and
14 that based upon that it seems to me that
15 we did everything which we thought was
16 reasonable to try and follow that course,
17 see to what extent the differences and the
18 disputes were nominal.

19 But then when it proved that they
20 were not, to in effect put to the test the
21 contention that you raised with us as to
22 why confirmation could not proceed.

23 As I recall, without repeating
24 ourselves, other than the provision about
25 violation of the loan and security agreement

Fabric

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3 the principal point advanced was that
4 under this agreement, namely the letter
5 agreement with the creditors committee, the
6 committee was not and would not be free
7 to release the fund and therefore confirma-
8 tion must fail.

9 It was following the lack of any
10 resolution of that question on the 15th of
11 July that we ultimately got into the hearing
12 on the 27th where you added the additional
13 ground that the absolute condition had
14 transpired without being satisfied and what
15 we have tried to do here is answer both
16 questions.

17 It seems to me that we did not
18 raise them. It seems to me that Mangels
19 raised them before us whether in the form
20 of a status report on the 15th or not, be-
21 cause the actual proceeding that was on here
22 on the 15th of July was the adjourned
23 hearing on confirmation which had been fixed
24 on the 13th of July when, I think, either
25 people from Mangels or people from your

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office or both were in the courtroom.

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There was no surprise as to what was going on on the 15th. Everything has flowed naturally from that.

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MR. ROSENBERG: I would disagree, Your Honor, where you posed questions: "Is Fabric Tree prepared to confirm an arrangement for \$600,000?"

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That was a question relating to confirmation with the burden on Fabric to go forward; however to the extent that you expanded your series of questions to include an ultimate determination of Mangels' right under an agreement I strongly object on due process grounds.

MR. FABRIZIO: If I may state, at the outset of that hearing Mr. Rosenberg as counsel for Mangels objected to the jurisdiction of this court.

Subject to that objection he agreed to go forward with the evidentiary hearing.

THE JUDGE: You are talking

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about July 17th?

MR. FABRIZIO: Yes, July 27th.

THE JUDGE: Let's keep the dates straight.

MR. FABRIZIO: Subject to his objection he agreed to go forward with the evidentiary hearing and I am sure that counsel and his client were fully aware that the purpose of that hearing was not merely academic but to raise the questions posed by Your Honor.

MR. ROSENBERG: You asked a series of questions and we tried to assist you to get answers.

THE JUDGE: It seems to me that the best way for all of you to get all of your controversies in one basket that can be resolved as quickly as possible and I don't want to impede anybody from getting an early resolution with anything that they disagree with as to see whether an order of confirmation were issued and it seems to me that the validity of that order

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and the validity of the findings and conclusion that I have reached here which are precursory to this can be all adjudicated and litigated in one single consolidated appeal, even though there might be two decisions and one order involved.

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One goes with the other. In terms of what will happen time-wise, I would certainly be willing to entertain or recommend to Judge Babitt if he is going to be here in connection with a confirmation order that he favorably entertain an application that says that no distribution will be made until a further order of the court that would then permit one of three things to happen.

The debtor could come into this court on or before the second or for that matter after the 2nd of September and ask for the distribution to proceed.

Number two, Mangels could come into this court once the appeal was perfected through some kind of a stay, or

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injunction pending the outcome of the
appeal.

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Number three, either or both of
you could go over to the District Court
ancillary to the appeal and seek some
other relief with stronger force.

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I am not trying to put anyone in
a position where the situation will be
changed out from under them without an
opportunity to fully protect their rights.

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It seems to me that the maturity
of the C.D. on September 2nd is a safety
valve from everyone.

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The longer that we wait here
the longer we run into what might be pre-
judice to Mangels in terms of the effective-
ness of this condition.

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Also it will make it harder to
see whether or not they really can confirm.

I think the sooner that is done
the better. It seems to me that we are
trying to understand to what extent con-
firmation can be effected.

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It seems to me that with the assurances that have been proffered here concerning the reduction in general claims and in the administration expense there should be no problems in meeting the \$600,000 number unless there is some other problem that I don't foresee.

Then I think you can have your appeal if you want it.

In judging the appeal I realize that your client will have to make a business judgment as to what happens with Fabric Tree in the interim.

I don't know whether or not anything can be worked out between Fabric Tree and Mangels to bridge that gap.

I have not given it any thought and hopefully wiser minds than mine will apply themselves to that question.

That is it, Gentlemen.

MR. TREPPER: Let me just tell you for the purpose of procedure. We will be prepared to submit an order of confirmation

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Monday.

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We would have been prepared by
for time with the schedules with respect
to the clerk and make sure that everything
is in order.

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I am suggesting that we provide two
things in the order of confirmation in con-
formity with what you have just said on the
record.

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A, that the designee of the credi-
tors committee Mr. Balaban be directed to
turn the C.D. over to Mr. Wallberg, the
disbursing agent, and also that Mr. Wallberg
will not make distribution with respect to
the schedules annexed to the schedules.

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THE JUDGE: I don't want him to
turn it over until the confirmation order
is signed.

MR. TREPPER: Yes, Your Honor.

MR. FABRIZIO: The way that it
is provided where the certificate will be
turned over in the proposed order of con-
firmation, to the disbursing agent.

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I would like a direction from
the court whether that is sufficient?

THE JUDGE: No, sir, I don't
think it is.

The more things to be done down
the road the worse it is.

MR. TREPPER: I would like to
direct in the order that there be no
greater distribution.

MR. ROSENBERG: Order on notice
to me, the pending further order of the
court for distribution.

MR. TREPPER: Yes.

THE JUDGE: I have a question
here.

For the purposes of the record,
will adjourn all Fabric Tree matters until
August the 14th at 10 o'clock, hopefully
before Judge Babitt.

If you people really are convinced
that you will finish this on Monday, finish
it, then I would be willing, I think rather
than put the burden on Judge Babitt to

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make arrangements to be here on Monday.

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MR. TREPPER: I appreciate

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that.

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However, the act of confirmation

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here is basically at this time ministerial

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and documentary. The clerks will review

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them.

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In the ordinary course none of

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the bankruptcy judges in my experience

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reviewed the schedules.

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We have as stated on the record

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by the professionals and the members of the

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committee that whatever the final total

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of those schedules will be there will be

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proportionate waiver of those schedules

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to bring those numbers down.

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THE JUDGE: Will you reflect that

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on the schedules?

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MR. TREPPER: Yes, I don't see

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any need for you to stay around for that

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type of activity.

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THE JUDGE: Okay.

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MR. FABRIZIO: Thank you, Your Honor.

Opinion and Order of
Judge Henry F. Werker,
dated January 11, 1976

4 327-2
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
In the Matter of :

FABRIC TREE, :

Debtor. :

OPINION

AND ORDER

75 B 1383
-----x

APPEARANCES: (See last page)

HENRY F. WERKER, D. J.

This is an appeal from an order entered on August 2, 1976 by the Honorable Roy Babbit, Bankruptcy Judge, acting in the absence and at the request of the Honorable Stanley T. Lesser, Bankruptcy Judge, to confirm the plan of arrangement of the debtor in possession, Fabric Tree, Inc. ("Fabric Tree"). Appellant Mangel Stores Corporation ("Mangel") seeks a determination that the bankruptcy court lacked jurisdiction to consider the rights of Mangel under an escrow agreement between Mangel and the Fabric Tree Creditors Committee (the "Committee"). Mangel also contends that the evidentiary hearing held in this matter failed to comport with the requirements of due process and that the findings following that hearing were erroneous.

Fabric Tree operates a chain of thirty stores selling fabrics, patterns and notions. Mangel owns a chain of apparel stores. In August of 1975, Fabric Tree filed a petition for an arrangement under chapter XI of the Bankruptcy Act, 28 U.S.C. § 701 et seq. Discussions with a group of outside investors led to the advancement of some funds to Fabric Tree but, before a plan of arrangement was filed, Mangel became involved in negotiations with Fabric Tree, its principals and the Committee. By May, 1976, these discussions had advanced to the point where

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three documents were signed:

1. A "purchase and sale agreement" dated May 4, 1976 between Mangel and the principals of Fabric Tree in which Mangel agreed to purchase the stock of the principals and to hire them for at least one year. This agreement, conditioned upon the confirmation of a plan of arrangement before July 15, 1976, was not submitted to the bankruptcy court for approval.

2. A "loan and security agreement" ("security agreement") dated May 4, 1976 between Fabric Tree and Mangel in which Mangel agreed to provide continuing financing to Fabric Tree in exchange for a first lien upon designated assets of Fabric Tree. The bankruptcy court approved this agreement on May 7, 1976.

3. An undated letter of confirmation ("escrow agreement") sent to the Committee by Mangel in which Mangel agreed to turn over a \$600,000 certificate of deposit to Christopher Ballaban, chairman of the Committee, as escrowee.¹ The certificate was to be used to fund a fifteen percent all cash plan for the creditors and it was payable to the order of Mangel on September 2, 1976. The escrow agreement was not submitted to Judge Lesser for his approval, but payment by the escrowee to the disbursing agent was expressly conditioned upon the entry of two orders by the bankruptcy court. First, the court had to grant Mangel a first security interest in all Fabric Tree assets on or before May 10, 1976. This requirement was met. Second, the court had to confirm a plan on or before July 15, 1976 requiring no more than \$450,000 for the payment of allowable unsecured claims and \$150,000 for priority and administration expenses. Whether this condition was fulfilled is a matter of dispute on this appeal.

In late June of 1976, Mangel discovered that Fabric Tree was using financing received from Mangel to reduce administration expenses incurred prior to

May 7, 1976 and to pay current operating costs. This, Mangel submits, increased its exposure under the escrow agreement beyond the agreed upon \$600,000 figure and prevented confirmation of the plan. In Mangel's opinion, it also necessitated the cancellation of purchase orders and trade guarantees entered into on Fabric Tree's behalf. Judge Lesser, on the other hand, found that it was around this time period that "Mangel decided that it no longer favored the acquisition of Fabric Tree."

At a hearing held on July 13, 1976 as part of the confirmation process, Judge Lesser fixed the fees to be allowed professionals involved in the arrangement proceeding. This was necessary in order to bring outstanding debts within the amount allowed under the escrow agreement. A further hearing to finalize confirmation was also scheduled at that time for the morning of July 15, 1976. Mangel was present at the July 13 hearing but raised no objection to the July 15 confirmation date.

Judge Lesser learned for the first time on the morning of July 15, 1976 that, according to Mangel, the escrow fund could not be utilized for the deposit required by statute because the terms of the escrow agreement had not and could not be met. Mangel also stated at that time that it would seek plenary relief if the escrow funds were released. Judge Lesser adjourned the confirmation hearing to the morning of July 27, 1976 so that the issue raised by Mangel could be adequately resolved and Mangel assured the court that in the interim it would not seek to collect the loans it had extended to Fabric Tree.

At the next hearing, held on July 27, 1976, Mangel continued to maintain that the financial provisions of the escrow agreement had not been met; to this it added the contention that confirmation could not take place in any event now that the July 15, 1976 date had passed. An evidentiary hearing to consider these questions was held that afternoon. Mangel participated in that hearing after

the court agreed that participation by Mangel would not be taken as a waiver of its objection to the bankruptcy court's exercise of jurisdiction.²

Following the July 15 and 27, 1976 hearings and without the benefit of transcripts, on July 30, 1976 Judge Lesser delivered an informal opinion from the bench. Although he indicated at that time that a written opinion might be prepared, it appears that this did not take place. Consequently, in reviewing the conclusions of the bankruptcy court, I am remitted to the corrected transcript of the adjourned confirmation hearing held on July 30, 1976.

Judge Lesser held that he had summary jurisdiction on several grounds to determine the rights of Mangel, Fabric Tree and the Committee under the escrow agreement. First, he observed that the character of Mangel's participation in the proceeding served to bring it within the jurisdiction of the court as either a party or one who consented to the court's jurisdiction. Second, he noted that to deny jurisdiction would be to "emasculate the ability of the Bankruptcy Court to supervise the confirmation process." Finally, Judge Lesser opined that deposit of the funds with the chairman of the committee was tantamount to deposit with the court for jurisdictional purposes; however, he did not rely upon this ground.

On the merits, Judge Lesser concluded that the July 15, 1976 confirmation deadline should not be enforced, that the \$150,000 ceiling on priority and administration expenses did not include expenses paid prior to the confirmation date out of operating funds and that the escrow fund could be turned over to the disbursing agent if the plan was confirmed by "the close of business" on August 4, 1976.

Since then, on October 22, 1976 Judge Lesser entered an order giving Mangel possession of Fabric Tree's assets and authorizing foreclosure of the Mangel

security interest in such assets and subsequent sale to the Sande Textile Corporation. Thus, only the disposition of the escrow fund is at issue here.

I. Jurisdiction

There are several established bases for the exercise of summary jurisdiction by the bankruptcy court. Of these, the major one is possession of the property by the debtor or the court. 2 Collier on Bankruptcy para. 23.05 (14th ed. 1975). Nevertheless, there have been instances in the past when the exercise of summary jurisdiction has been upheld without a showing that there was property in the actual or constructive possession of the court or the debtor simply because a contrary ruling would undermine the effectiveness of the bankruptcy courts as a vehicle for the resolution of serious economic problems. For example, in Fox Metal Industries v. Frontier Heating & Plumbing Co. 453 F.2d 1128 (10th Cir. 1972), Frontier, a mechanical contractor on a construction project, entered into a subcontract with Fox, a sheet metalwork firm that later filed for reorganization under Chapter X of the Bankruptcy Act. After Fox proved deficient in its performance, Frontier and Fox's receiver agreed to modify the subcontract. Performance again fell behind schedule and Frontier stopped payment on checks to Fox which had been returned for insufficiency of funds. The bankruptcy court did not find it necessary to determine whether the dishonored checks constituted property within the actual or constructive possession of the court before exercising summary jurisdiction. Instead, the trial judge observed:

"... I'm looking through the checks as to what actually the relationship of the parties was. And the thing that impresses me is ... that there was an imposition on the receiver and the property of the court as far as these people were concerned. They sought to become whole at the expense of the receivership and to let them get away with it, as I say, would give them property to which they are not equitably entitled."

Id. at 1130.

On appeal, the circuit court affirmed the decision of the trial court. In doing so, it relied upon Frontier's "participation in the receivership as above indicated, and its imposition on it or interference therewith." Id. at 1131.

Similarly, in Governor Clinton Co. v. Knott, 120 F.2d 149 (2d Cir. 1941), appeal dismissed, 314 U.S. 701 (1942), a case cited in Fox Metal, the bankruptcy court determined that it had jurisdiction to resolve allegations that a management firm hired to operate the debtor's business had engaged in fraudulent practices. After an evidentiary hearing, it ordered the repayment of monies which were not within the custody of the court. This exercise of jurisdiction was upheld by the Court of Appeals for the Second Circuit which stated that:

"... [S]ummary jurisdiction may be invoked for purposes other than to protect property within the actual or constructive possession of the court. Here a contract was made with the debtor in possession and a fraud worked on its estate through a common conspiracy among the respondents. This amounts to a fraud and imposition on the court itself; and in such cases the court undoubtedly has summary jurisdiction to protect itself and the interests of the persons and property within its custody."

Id. at 152.

The Fox Metal and Governor Clinton decisions present unusually compelling reasons to proceed by summary jurisdiction, but I agree with the bankruptcy Judge that the instant action merits similar treatment. The security agreement submitted to and approved by the bankruptcy court granted Mangel an interest in assets plainly within the custody of the court. But that agreement comprised only one element of a larger plan whereby Mangel would gain control of Fabric Tree and its assets. The extent to which the signing of each agreement hinged upon the successful negotiation of the others is best demonstrated by reference to the language of the security agreement presented to the court below

for approval. It states that Mangel:

"... intends to provide funds to Fabric [Tree] to confirm a plan of arrangement in the Proceedings and in connection therewith has contracted to purchase all of the outstanding common stock of Fabric [Tree]."

By the time that the controversy over the escrow terms arose, Mangel had also become intimately involved in the operations of Fabric Tree. Fabric Tree had moved its corporate offices to the headquarters of Mangel and for some time Mangel had permitted Fabric Tree to use revenues derived from retail sales to pay expenses. This was done despite a clause in the security agreement which required Fabric Tree to first turn its revenues over to Mangel. Mangel was also present at bankruptcy court sessions held to consider the ultimate disposition of Fabric Tree. Although the record below does not show when Mangel formally entered an appearance, Judge Lesser noted that Mangel's "presence was here. We felt it. We saw it. We were told about it."

I therefore conclude that it would work an unfair imposition upon the operations of the bankruptcy court were it not permitted to decide disagreements under the escrow agreement. In doing so, I am mindful that chapter XI arrangements serve ameliorative purposes distinct from those of other bankruptcy proceedings and that they therefore justify a broad construction of the court's jurisdiction. See In re Stockman Development Co., 447 F.2d 387 (9th Cir. 1971).

Mangel contends that the Fox Metal and Governor Clinton cases are inapplicable here because each involved a contract entered into with an officer of the court and assets within or owed to the debtor's estate. I am not persuaded, however, that the two cases cited are inapposite. Neither the Fox Metal nor the Governor Clinton court relied upon the presence of a res in custodia legis to find that summary jurisdiction existed. Moreover, unlike the instant action, the two

cases did not involve contractual arrangements which had been submitted to the bankruptcy court for its formal approval.⁴

Mangel also cites a series of cases for the proposition that attempts by bankruptcy courts to exercise jurisdiction over escrow funds have never met with success. The cases cited, however, generally involve different controlling principles of law. Mid-Jersey National Bank v. Fidelity-Mortgage Investors, 511 F.2d 640 (3d Cir. 1975), for example, merely held that when funds are deposited in a federal district court pursuant to a court order in an ongoing action, a bankruptcy court may not intercede to resolve the underlying dispute when a chapter 11 petition is subsequently filed. Baxter v. United Forest Products Co., 406 F.2d 1111 (8th Cir.), cert. denied, 394 U.S. 1018 (1969), turned on the failure of the plaintiff to comply with Rule 64 of the Federal Rules of Civil Procedure which requires that the seizure of property as security for a judgment proceed under state law. Sapich v. West, 263 F.2d 422 (2d Cir.), cert. denied, 360 U.S. 916 (1959), involved a voluntary petition in bankruptcy, but the scope of summary jurisdiction was not even an issue in the case. In United States v. Neiwirth, 370 F. Supp. 929 (D.N.J. 1973), a court appointed receiver sought to shelter funds within the jurisdiction of the bankruptcy court although they had been transferred there from the account of a third party without the consent of the court. Clearly, Fabric Tree is not engaged in such a clandestine effort.

Two cases cited by Mangel do not suffer from such obvious infirmities. Both Bayview Estates, Inc. v. Bayview Estates Mobile Home-Owners Assoc., 508 F.2d 405 (6th Cir. 1974), and In re H.L. Gentry Construction Co., 200 F. Supp. 546 (E.D. Mich. 1961), aff'd, 314 F.2d 945 (6th Cir. 1962), held that the bankruptcy court lacked summary jurisdiction over escrow funds established by parties other than the debtor. But in neither of these cases was the creation of the

escrow fund even remotely related to matters then pending before the bankruptcy court. This is in marked contrast to the escrow fund in the instant action which (1) was an important part of the overall plan to gain court approval of a satisfactory arrangement, (2) grew out of negotiations involving both Fabric Tree and the Committee and (3) was conditioned upon the entry by the bankruptcy court of an order approving the plan of arrangement.

Again, denial of summary jurisdiction here would, in my opinion, seriously impose upon efforts undertaken by the bankruptcy court at the behest of many parties including Mangel. I therefore decline to follow Bayview Estates and Gentry Construction to the extent that they conflict with the holdings in the Fox Metal and Governor Clinton cases, and I conclude that Judge Lesser had summary jurisdiction over Mangel.

II. The Constitutional Claim

Mangel also raises a due process objection to the manner in which the bankruptcy court proceeded, particularly its failure to allow time for formal pleadings or discovery. At the beginning of the July 27, 1976 confirmation hearing, counsel for Mangel objected to the exercise of summary jurisdiction by the court, but no due process objection was articulated. Before the first witness was called that afternoon, counsel for Mangel carefully preserved his jurisdictional objection, however, he then agreed without further objection to proceed with a hearing on the merits. Indeed, during the course of that hearing he called several witnesses. This is, therefore, not a case where a party had no advance notice of the nature of the proceeding. Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U.S. 292, 307 (1937). As the court below observed, Mangel was not a stranger to the proceeding; it knew of the prior confirmation hearings before the bankruptcy court and was not taken by surprise. Moreover, having just come out of chapter XI itself,

it must have also been familiar with the operations of the bankruptcy court.

I therefore conclude that Mangel knowingly waived its objection to the hearing below by failing to object. See, e.g., Unit 1 Vitasafe Corp., 352 F.2d 62 (2d Cir. 1965); Schwartz v. S.S. Nassau, 345 F.2d 466 (2d Cir.), cert. denied, 382 U.S. 919 (1965).⁵

III. The Findings Below

Finally, Mangel contends that the bankruptcy court erred in its interpretation of the escrow agreement conditions and that Fabric Tree and the Committee have not met their burden of showing that time was not of the essence under the escrow agreement. The conclusions of the Bankruptcy judge must stand, however, unless they are shown to be clearly erroneous. Bankr. R. 810.10.

It is a fair inference from the evidence that time was not of the essence when the escrow agreement was signed. Mangel intervened in the chapter XI negotiations primarily because it wanted to convert lucrative shopping center sites leased by Fabric Tree into outlets for Mangel's apparel. Yet, the purchase and sale agreement did not require the Fabric Tree principals to request that landlords consent to such modifications until well after the July 15, 1976 "deadline." During the interim, it was Mangel's initial intention to continue operating fabric stores at the shopping centers. Mangel also had to make most of its inventory commitments for the fall season in advance of the July 15, 1976 date, whether or not confirmation resulted. Thus, a few days of delay would not have changed the scope of the Mangel financial commitment to Fabric Tree.

Operationally, there was also no difference between the proposed and the actual date of confirmation. Fabric Tree was already housed in Mangel headquarters. Moreover, the escrow fund was in the form of a certificate of deposit payable on September 2, 1976. Therefore, payments to creditors and others

would not have taken place until that date even if the plan had been approved at an earlier time; and interest on the certificate continued to accrue to Mangel regardless of the confirmation date.

In an effort to give effect to the actual intent of the parties to a contract, the courts have moved away from the rigid view that time is always of the essence in commercial contracts. See, e.g., Hayes Mfg. Corp. v. McCauley, 140 F.2d 187 (6th Cir. 1944); The New Jersey Co. v. Nathaniel Wise Co., 55 Misc. 294, 295, 105 N.Y.S. 231, 233 (App. T. 1907), aff'd, 125 App. Div. 918, 109 N.Y.S. 1139 (1908). Thus, Mangel's recitation of many older cases holding to the contrary is of little value as each case should be decided after an examination of the particular evidentiary facts surrounding it, and not upon generalizations. Judge Lesser had an opportunity to observe the demeanor of witnesses at the evidentiary hearing and, based upon the record below, I agree with his finding that at the time the contract was signed it was the season, not the date, of confirmation that was of significance to the parties and that confirmation on August 2, 1976 was therefore timely. 5 Williston on Contracts § 663 (3d ed. 1961); Restatement of Contracts § 276(a) (1932).

I also share the bankruptcy court's view that Mangel wrongfully prevented confirmation on July 15, 1976. At that time, Mangel argued that Fabric Tree's use of loan funds to pay expenses incurred prior to May 7, 1976 as well as current operating costs raised the total amount necessary to pay administration and priority expenses above the agreed upon amount of \$150,000. However, prior to July 15, 1976 Mangel had not insisted that Fabric Tree remit its daily receipts to Mangel. Thus, it had waived the right to rely upon the security agreement clause requiring immediate delivery of such items to Mangel. The president of Mangel also testified that he did not expect current operating costs to be charged against the \$150,000 allocation. In light of this testimony Mangel cannot seriously contend

that such costs should be included. More importantly, the testimony shows Mangel presented the court with objections it knew were baseless.

Gulf Oil Corp. v. American Louisiana Pipe Line Co., 282 F.2d 1041 (Cir. 1960), arose under similar facts and is instructive. There, Gulf had contracted to sell gas to American Louisiana provided that American Louisiana obtained within six months authority from the Federal Power Commission to transport the gas. During the application process, Gulf presented to the FPC additional conditions that were not part of the agreement although it knew or should have known that this would delay final approval of the application. The court of appeals held that Gulf had an obligation not to interfere with the process of application and approval and that, having breached that duty, it could not rely upon the delay it had caused as a basis for cancellation of the contract.

In the instant action, the bankruptcy judge found that Mangel's objections on July 15, 1976 were not raised in good faith. Much of the record lends support to this finding, particularly the cancellation by Mangel of orders and guarantees previously issued for the benefit of Fabric Tree. Judge Lesser also concluded that Mangel's objections and threats of suit had caused counsel for Fabric Tree to abstain from requesting confirmation on July 15, 1976. Mangel has not shown this finding to be clearly erroneous. I therefore agree with the court below that Mangel, having thwarted timely confirmation, may not now rely upon the passage of the escrow agreement deadline to justify cancellation of the contract and return of the escrow fund.

IV. Conclusion

As the bankruptcy court observed, this is a most unusual case which presents questions not squarely addressed in the earlier decisions of this and other courts. Nevertheless, it is my firm belief that "third party acquirers who want to

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feed at the trough of the bankruptcy court's door" must be held to the substance of their bargain.

Accordingly, the decision of the bankruptcy court to approve the arrangement petition is affirmed.

SO ORDERED.

DATED: New York, New York
January 11, 1977

Henry J. Livster

U. S. D. J.

In the Matter of FABRIC TREE, 75 B 1383

NOTES

1. Although the escrow agreement bears no date, the bankruptcy court found that it was "apparently executed on or about May 4, 1976."
2. Mangel contends that it preserved all objections, including its due process claim, by noting on the record of the July 27, 1976 hearing that "by not taking an interlocutory appeal on the question of jurisdiction and going forward with the hearing, [Mangel has] not waived any rights whatsoever." While the concept of an omnibus objection may seem logical to Mangel, I need not consider this procedural innovation since, in context, it is clear that the statement by Mangel's counsel and the court's ready assent to it were only directed to questions of jurisdiction.
3. Similarly, the purchase and sale agreement provides that Mangel:
"... intends to make an offer ... to the creditors ... to advance, loan or contribute to Fabric an amount sufficient to pay general unsecured creditors in the Proceedings 15% of their claims (up to a maximum of \$450,000) in cash upon confirmation, plus administrative expenses and priority claims (up to a maximum of \$150,000). . . ."
4. The Second Circuit has suggested, possibly in dicta, that all elements of complex transactions involving corporations proceeding under Chapter XI should be heard by the bankruptcy court as a matter of summary jurisdiction:
"We think it a reasonable construction of the Act to say that, where a party enters into an agreement before the referee, it thereby subjects itself to the bankruptcy court's summary jurisdiction as to the entire dispute over enforcement of the agreement." In re Sherman Plastering Corp., 340 F.2d 915, 919-20 (2d Cir. 1965).
5. Mangel did raise a due process objection after Judge Lesser delivered his opinion on July 27, 1976, but an objection at that point in time was clearly of no consequence.

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one (1) copy
Service of ~~two (2) copies~~

the within Joint Appendix is hereby admitted this
15th day of March, 1977

Deborah Deere
Attorney for Educ. Trust Inc.

one (1) copy
Service of ~~two (2) copies~~ of

the within Joint Appendix is hereby admitted this
15th day of March, 1977

Hahn Hesse Margolis & Ryan
Attorney for Cred. Committee